Supreme Court, U.S.
FILED

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No. _____

In the
SUPREME COURT of the UNITED STATES

MICHAEL M. KENNEDY,
Petitioner

v

GRATTAN TOWNSHIP, MICHIGAN,
et al, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO CIRCUIT COURT OF APPEALS
FOR THE 6TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS

Private attorneys, acting under color of law as prosecutors with no jurisdiction, who conspired with a biased state judge and local officials, maliciously prosecuted petitioner in a state property rights v. zoning case. After exhausting all appeals, Petitioner filed this malicious prosecution civil rights case pro se. It was quickly dismissed on *Rooker-Feldman*, prosecutorial immunity and the state judge was dismissed *sua sponte* for alleged lack of service. Sanctions were awarded defendants. The appeal raised and briefed 15 questions, without a complete copy of the docket of the district court, and then was barred from filing a reply brief and appendix or copy of the record by the clerk. None of the questions were addressed. The panel affirmed on *res judicata* grounds - not raised before. Rehearing en banc was denied.

1. *Greenlaw v US* (07-330) held that appellants have the due process right to frame the issues for decision on appeal. Since none of the appellant's pro se questions were addressed and justice was denied, will this Court settle this conflict and decide whether pro se appellants have equal rights on appeal to those with attorneys? Does strict scrutiny apply since fundamental rights are at risk? Is *de novo* review of summary judgment of the record or the lower court decision?

2. Judges are supposed to be unbiased. Two of the court of appeals judges have served on many panels with the district court judge in this case over many years. Does that close association create a

substantial risk of bias in decisionmaking that could and did prevent justice from being served for the pro se appellant? Does strict scrutiny apply to review of bias issues?

3. *Imbler v Pachtman*, 424 US 409 (1976) held that public prosecutors are absolutely immune from liability for civil rights violations. In this malicious prosecution case lower courts have extended that immunity to for-profit private attorneys. Should the absolute prosecutorial immunity granted to private-for-profit attorneys acting under color of law in civil rights cases be reversed? And is malicious prosecution a civil rights violation?

4. Was the award of attorney fees without just cause? And if so was it retaliation for bringing suit against judges and lawyers or punitive and should strict scrutiny apply to attorney fees granted against pro se civil rights plaintiffs?

LIST OF PARTIES (Respondents)

Grattan Township
Lana Green
David Munson
Richard Herweyer
Paul Knoerl
Dennis Heffron
Steven R. Servaas
Ross Leisman
James Brown
Mika, Meyers, Beckett & Jones

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the 6th Circuit Court of Appeals appears at Appendix A, 1a. under separate cover. It is an unpublished decision. The motion for rehearing en banc was denied and appears at Appendix L, 52a. The opinion of the District Court on summary judgment appears at Appendix C, p 8a. The opinion of the District Court granting attorney fees appears at Appendix H, 37 a. The magistrate's report and recommendation for summary judgment appears at Appendix E, 18a. The magistrate's report and recommendation for attorney fees appears at Appendix I, 40a.

JURISDICTION

The jurisdiction of this Court rests in 28 USC 1254. The Court of Appeals decision was filed March 26, 2008. (App A, 1a) Rehearing en banc was denied on August 26, 2008. (App L, 52a) Extension of time was granted by Justice Stevens to and including January 23, 2009. (App M, 53a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (Michigan Constitution parallel part Art. I, sec 23)

Fourteenth Amendment
(relevant part)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC 453 Oath of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

28 USC 455 Disqualification of justice, judge or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, . . (relevant part)

28 USC 1654 Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by

counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Michigan Constitution Article VII sec 4

There shall be *elected* for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a *prosecuting attorney*, whose duties and powers shall be provided by law." (In relevant part.) (emphasis added)

STATEMENT OF THE CASE

This civil rights case under 42 USC 1983 and 1985 involves persons and a state subdivision involved in two state cases, one that was a malicious prosecution without jurisdiction and the other a Freedom of Information Act (FOIA) case brought by Petitioner.

The State cases

Petitioner owns and has long lived on a dirt road on about 50 acres of woods and farmland in rural Grattan Township, Kent County, Michigan where he has exercised his Freedoms and Liberties of property ownership enjoyed by our Forefathers and guaranteed by the Constitution. This included having many vehicles of different types from farm equipment, to semi trucks and trailers, used in his work as a truck driver, to recreational vehicles, trailers, collectable cars and others he repaired.

The Township allegedly passed in 1973 zoning Ordinance 1 that prohibited the storing of unlicensed and uninsured vehicles outside of buildings. Petitioner was charged with said offense and prosecuted. Multiple violations of Petitioner's civil rights resulted. Respondents were so desperate to convict they hired

an airplane and took pictures of the property for evidence. Their official was not authorized by law and not taken an oath.

The prosecution was by private practice lawyers and law firm hourly hired by the Township and biased in its favor and favored by the judge. Unbeknown to Petitioner the prosecutors had one or more *ex parte* conferences with Judge Servaas without the Petitioner's knowledge shortly after the charge was filed in 2001 (grounds for new trial under *US v Minsky*, 953 F2d 870 (6th Cir 1992)).

The lawyers and the Township defendants deliberately withheld exculpatory evidence of lack of valid ordinance, thus lack of jurisdiction, and lack of oath of the official pressing charges in violation of *Brady v Maryland* until long after the trial.

Petitioner attempted to represent himself, but he was unjustly threatened with contempt and then later jailed for 4 days for defending himself. He was also fined $250 for the alleged contempt by the biased judge, who never identified the contempt - which could only be free speech arguing for a jury trial, since the ordinance said it was a misdemeanor. (Mich. Const. Art. 1 sec 17; 6th Am. 7th Am.) Petitioner then hired two lawyers from outside the county that were not favored by the judge.

They filed a Freedom of Information case to secure information withheld by defendants and won, but not until after Petitioner was convicted and was ordered, without authority, to remove the vehicles from his property or license and insure them or place them in buildings. (The FOIA case ultimately discovered after the trial that the Township had never enacted its ordinance in accord with state law by

publication and was therefore invalid and the official did not have an oath of office.)

The Township repealed Ordinance 1 about a month before the trial. Petitioner's attorneys then moved to dismiss based on the repeal of Ord. 1 before the trial. Respondents falsely claimed it had not been repealed. Judge Servaas refused to allow the motion to be heard on the day of trial even though it was scheduled for then. He then substituted witnesses and had others sign the ticket in order to attempt to make it valid. He then convicted Petitioner knowing the ordinance was likely repealed and without regard for lack of jurisdiction of a valid ordinance.

The order was deceptively written by the Township attorneys. Petitioner's attorney attempted to contest it, but the Judge signed it with out the required due process of allowing a hearing to resolve differences, which was scheduled.

At sentencing Petitioner was coerced by the Judge to agree to pay all attorney fees, but refused. Thus he was fined $500 and ordered to pay $500 costs (attorney fees) and remove all the vehicles and be inspected.

In the mean time the FOIA case was decided and an order issued to Defendants to reveal the information demanded. The information was received long after the finding of guilt. It revealed that the official had no oath of office and revealed Ordinance 1 had never been published and thus violated State law and means that jurisdiction was lacking from day one. The Township was ordered to pay $1400 in attorney fees in the Freedom of Information case for unlawfully withholding information.

Petitioner pro se appealed by right from the state district court to the local circuit court. The newly elected judge refused to reverse. The alleged prosecutors lied to the appellate court and subsequent courts and the appeal was unsuccessful.

Grattan by defendant attorneys filed a cross appeal, but then withdrew the appeal and moved for attorney fees at the trial court. Without any jurisdiction, since the appeal had been filed, or authority the judge ordered Petitioner to pay attorney fees to the Township in the amount of $5,000 for the Township's alleged prosecution costs. Later without due process Petitioner was found to be in criminal contempt for not paying the attorney fees and a warrant may have been issued for his arrest.

On appeal the attorneys falsely contended the ordinance was not repealed because it was not published and the Judge believed them. Petitioner later found evidence it had been published. Without a valid ordinance there was no jurisdiction or authority to prosecute Petitioner.

After the appeal Petitioner discovered the trial judge had a secret *ex parte* conference with attorneys for the Township at the beginning of the case. Furthermore he discovered evidence that the attorney for the Township had lied to the circuit court. These and *Brady* issues were raised in the short 21 days allowed to appeal *by leave* to the Michigan Court of Appeals (MCA). But these discretionary appeals to the MCA and Supreme Court were not accepted. This Court refused to grant certiorari. Pet #05-953.

The Federal case

Petitioner then filed this 42 USC 1983 and 1985 suit alleging violations of his civil rights - taking his property, malicious prosecution, harassment, *Brady* violations, unauthorized prosecutors, biased judge, conspiracy and other challenges - seeking money damages in excess of $75,000, jury trial, declaratory and injunctive relief. The defendants were sued in their individual and officials capacities.

The state judge was served by waiver at his court under Rule 4, but never responded. Where the judge lived at the time is not certain according to state judicial tenure authorities. He was also served later by certified mail at the court and receipt was received. All other defendants were served personally and responded. The state judge never appeared or responded to the complaint served by waiver and was dismissed *sua sponte* by the biased district court judge who knows, sits in the same county with and is likely friends with, the long sitting popular state Judge Servaas. (App C, 13a) This judge was listed as an appellee on the notice of appeal, but was deleted by the clerk without reason or notice. (A favor to the district court judge - his friend - from his other friend, the clerk?)

The magistrate briefly summarized some of the issues of the complaint related to the above civil rights violations. (App E, 18a-19a) The attorney defendants filed a hybrid motion for dismissal - summary judgment. (App E, 20a) Discovery was barred by the magistrate and plaintiff had to resist motions to dismiss and summary judgment in a very short time. (App K, 51a; F, 32a) (The magistrate falsely asserts

intent to extend time for discovery when there was none.)

In this "new era of summary judgment practice" the magistrate claims it is his supreme duty to "weed out fanciful, malicious, and unsupported claims before trial." (App E, 18a)

He recommended the case be dismissed on prosecutorial immunity - primarily in reliance on 6th Cir cases without discussing any opposing arguments that the attorneys are not valid prosecutors or deserving of immunity. (App E, 24a-27a) He also found *Rooker-Feldman* and collateral estoppel applied and recommended attorney fees be granted. (App E, 27a-30a) Petitioner objected. The Township filed for summary judgment about the same time, likely using the magistrates opinion as guidance.

The judge granted summary judgment to the alleged prosecutors on immunity grounds even though they are not authorized by the State Constitution, do not live in the Township, are not elected and are biased by being hourly paid by the Township and are clearly not interested in justice. The court never decided if Petitioner's constitutional rights were violated as is required in summary judgment cases and never considered the substantial and controlling opposing evidence. The attorneys and Township defendants were unjustly granted summary judgment on lack of jurisdiction citing *Rooker-Feldman*. (App C, 8a) In neither instance did the court consider or discuss Petitioners opposing arguments or challenges or the record evidence. Defendants were clearly *not* "entitled to judgment as a matter of law." The evidence of record proved Petitioner should have been granted summary judgment for clear violations of civil rights together

with case law. Petitioner had no chance to amend his complaint, but sought to reserve the right.

Petitioner believes the attorney fees were in retaliation for suing a judge and attorneys. The attorney fee sanctions of $4,830 and $3,688 were awarded Defendants under guise and false allegations the complaint was frivolous - with no evidence thereof. (App E, 29a; C, 14a) The award of specific attorney fees took place *after* Petitioner had filed to appeal because of the time limitations by law. (App J, 41a; H, 37a) (Petitioner believes the judge deliberately waited past the 30 days to appeal in hopes he would wait also and lose the right to appeal the primary decision because of untimeliness.)

Petitioner believes the record reveals the federal judge and magistrate are biased against pro se Petitioner and in favor of defendants, as in other pro se cases. Evidence thereof is the refusal to find many facts in favor of the nonmovant and refusal to even mention Petitioner's 3 affidavits and substantial evidence submitted, plus the award of attorney fees. In addition, Petitioner submitted substantial evidence to the record that the state court prosecution was neither fair nor full and was filled with the errors and civil rights violations listed above, but the district court and magistrate refused to acknowledge any of this evidence and attempted to cover it all up by falsely asserting the opposite. (App C, 12a "[P]laintiff argues that he did not have a full and fair opportunity to litigate these issues in the state courts.") It is extremely easy for a judge to say it was full and fair when he chooses to ignore the truth and the evidence. One cannot present all the evidence of deliberate errors on appeal and have any space to argue the other issues.

On appeal to the 6th Circuit Petitioner was denied a complete copy of the lower court docket sheets including entries concerning attorney fees, the right to have that docket before his reply brief was filed and an extension of time to file the reply brief and copies of the record by the court clerk. (App B, 7a)

On appeal by right *none* of the 15 questions raised by defendant were addressed or answered by the panel in violation of *Greenlaw v US* (07-330)(2008). They did not address *Rooker-Feldman* or any argument made by Appellant. Instead they affirmed on *res judicata* grounds, an issue never raised below, briefed or ruled on and only mentioned in Appellees' brief – to which Petitioner was not allowed to respond by the clerk. The case was *not* reviewed *de novo* as required by law, nor were any of the facts viewed in Petitioners favor. It is doubtful the record was even available. Petitioner has no evidence it was sent and he was prevented from sending copies as he intended. (Petitioner sought to secure the docket via superintending control application to Justice Stevens, but it was misplaced.) They also refused to consider Petitioner's arguments and evidence against prosecutorial immunity that proved these were not authorized prosecutors according to the Michigan Constitution and were biased by being hourly paid private attorneys. They affirmed sanctions for attorney fees without addressing any issue raised in opposition. The clerk refused to provide a copy of the court of appeals docket when twice requested. (App A, 1a)

On motion for rehearing en banc Petitioner raised 7 questions (although he forgot to put the questions in, but they could be deduced from the paragraph headings). Further he moved to disqualify

all of the judges who had sat on panels with the district court judge or knew him personally, a large number. Appellant also requested that superintending control be exercised over the clerk to compel him to provide copies of the docket sheets, as is his duty. But rehearing was denied.

All of the facts presented here are confirmed by the record.

REASONS FOR GRANTING THE PETITION

I.

THE 6TH CIRCUIT REFUSED TO ANSWER ANY OF THE QUESTIONS OF THE PRO SE APPELLANT. IT HAS DONE THAT TO OTHER PRO SE LITIGANTS. RESOLVING THIS CONFLICT IS NECESSARY TO JUSTICE.

Greenlaw v US, (07-330)(2008) is a landmark case for pro se litigants even though it did not involve one. Why? Pro se litigants have for many long years been denied due process on appeal, as this case clearly demonstrates.

Very few cases have set out the specific rights and process due appellants by law and no statute specifies them. Therefore, pro se litigants have been unable to find justice when the appellate courts discriminate against them. For pro se litigants this has been a huge problem. They usually are not heard on appeal, just as they are not fully, fairly and truthfully heard in the district courts and state courts. This question has been raised before, but not addressed as shall be seen below.

Greenlaw held:

"In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, *we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present*. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights. See *Castro v US*, 540 US 375, 381-383 (2003)." *Id.* p 5. (emphasis added)

Petitioner presented 15 questions on appeal and briefed them, but not one was addressed. The present case demonstrates clearly that what *Greenlaw* says is the law of due process on appeal is not true for pro se appellants in the 6th Circuit. Their intent has not been to "protect a pro se litigant." *Id.* Exactly the contrary - to make sure he and other pro se litigants do not win or even get a hearing, let alone a fair one. Thousands of pro se litigants have lost their rights to enforce civil rights laws in this Circuit.

The case of *Dred Scott v Sanford*, 60 US 393, 428 (1857) held:

> [I]t is not only the right, but it is the judicial duty of the court, to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment, and remand the case.

The Court needs to confront this conflict between law and practice of the court of appeals and protect pro se litigants, a protected class by law.

Appellant's questions presented pro se were deliberately not addressed by the court of appeals panel in order to affirm the judgment below.

Petitioner timely appealed, filed a brief with 15 questions and each was adequately briefed and provided compelling reasons to reverse summary judgment according to the grounds decided by the district court.

A review of the questions and comparison to the opinion of the appellate panel proves clearly that they did not address any one. In fact it is doubtful they read the brief.

The questions are quoted as follows: (bracketed portions added afterward for clarity)

(6th Cir Appeal)
QUESTIONS PRESENTED

1. Whether Plaintiff's constitutional rights, right to due process of law and to his day in [federal] court, was adversely affected by the absence of 3 judges from the 4 judge district court by having the one overloaded judge decide the case?

2. Was Defendant Judge Servaas incorrectly dismissed [sua sponte] for lack of service when the record shows he was served with waiver of service and [by] certified mail, but never responded?

3. Did the state judge's ex parte conference with prosecutor alone create bias sufficient to violate 28 USC 144, 453, 455 and/or rulings of the Supreme Court

requiring an impartial decisionmaker? If so, is that bias sufficient to void the state court judgment? If not, would it be considering all the other bias and prejudicial rulings? Alternatively, did the *ex parte* conference with evidence from the record show sufficient bias to be disqualified from hearing the case?

4. Whether the private for profit hourly paid attorneys acting as prosecutors in the state case, without state constitutional authority, who conspired with the judge and local government officials, withheld exculpatory evidence [in violation of Brady v Maryland – that the ordinance had never been enacted lawfully and withheld evidence that it had been repealed and lied about it on appeal claiming it had not been repealed] and prosecuted otherwise without jurisdiction are within the scope of prosecutors deserving immunity envisioned in *Imbler v Pachtman*, 424 US 409 (1976), [regardless of the contrary holdings of] the constitution and other decisions of the Supreme Court, sufficient to avoid civil rights liability?

5. Is the state statute that pretends to offer immunity to state officials unconstitutional because it is contrary to state and federal authorities?

6. Does the award of attorney fees in this case at the district court pursuant to 42 USC 1988 conflict with the intent of the First Amendment right to petition for redress of grievances and/or the 14th Amendment right to enforce Constitutional rights against the states and their agents and [/or alternatively] lack authority there in?

7. In award of attorney fees under 42 USC 1988, is there sufficient evidence in the record of frivolousness, if any, to survive strict scrutiny?

8. Whether attorney fees imposed by the state in an alleged zoning enforcement action is in violation of the common law or other rights citizens have?

9. Does the Rooker/Feldman doctrine applied in this case as a bar to jurisdiction of this civil rights action under 42 USC 1983, 1985 and 1988 squarely conflict with the intent of the People and Congress in enacting the 14th Amendment and the subsequent enforcement statutes enacted by Congress under the 5th section thereof?

10. Does *Rooker-Feldman* bar federal DC jurisdiction when the states highest court denied review and if so, does it deny review when the US Supreme Court also denied review, as in [the prior related state] this case?

11. Does *Rooker-Feldman* unjustly negate the First Amendment rights of federal plaintiffs who have been victims of state judicial civil rights violations?

12. Does collateral estoppel or 28 USC 1738 absolutely bar jurisdiction of a federal district court in a civil rights action seeking collateral review just because a state court has ruled on an issue related to the civil rights action or, alternatively, did the 14th Amendment deliberately open state actions for lower court federal review to insure adherence to federal rights in state cases?

13. Whether the civil rights conspiracy statute, 42 USC 1985, may be enforced in conjunction with 42 USC 1983 to enforce the civil rights liability in accord with the 14th Amendment's protected rights [where private attorneys conspired with public officials] and [if not] whether Plaintiff is allowed to amend the complaint to include section 2 to correct an

inadvertent error of omission regarding the conspiracy charge under 42 USC 1985?

14. Does the Michigan practice of allowing attorneys to write judicial orders violate the [US] Constitution?

15. Whether Township Ordinance 1 is in effect a seizure of private property in violation of the Constitution and of Appellant's rights?

Both the Township Defendants and Attorney Defendants filed opposing briefs, but mostly did not even address the questions raised by Appellant.

One of the two raised for the first time the issue of *res judicata* in a small section of the brief. *Res judicata* had never been raised at the district court. Guess what? The court of appeals adopted that as the ruling of the court to affirm.

Both appellees referenced district court documents related to attorney fees orders in excess of # 50, which is the last one on the docket sheets Appellant had. So he went to court and purchased a second copy, but it was identical. Appellant then requested the Court of Appeals clerk provide the correct docket sheets. They refused. In fact they also refused to provide a copy of their docket when requested by phone and by mail. Appellant needed a correct docket sheet to correctly reference filings by number for his reply brief and the appendix. He requested an extension of time to secure the docket and make these filings. Instead, he was sent a couple of notices by the clerk rejecting his request. (See App B 7a) Appellant still does not have correct docket sheets of the district court and does not have any from the 6th Cir., even though it has been requested twice.

They refused to allow time for a reply brief and contended the case would be decided on the record. But Petitioner was never noticed that the record was sent and doubts to this day that it was.

The 6th Circuit panel adopted *res judicata* as grounds to affirm. (App A, 3a) They deliberately avoided *Rooker-Feldman* because it was defeated.

Review is necessary to protect pro se litigants rights, which are also protected by the Constitution and federal law, and to insure they have rights equal to attorney represented litigants on appeal.

The First Amendment protects the right to "petition" for redress of grievances - a right of pro se litigants which should be equal to the rights of those with attorneys.

The 14th Amendment protects privileges and immunities - which includes the right to speak for oneself in court. The Equal protection clause protects the liberty of going to court for oneself and the rights thereof so they are at least equal to those of attorney represented appellants.

Congress has protected the right to be in court pro se by recognizing the old long established common law right to represent yourself in court. 28 USC 1654.

The Supreme Court has wisely protected pro se rights in some cases. *Haines v Kerner*, 404 US 519 (1972); *Farretta v California*, 422 US 806 (1975); *McKaskle v Wiggins*, 465 US 168 (1984). *In re Little*, 404 US 553 (1972) the petitioner was forced to represent himself by a state judge and then found in contempt for stating the judge was biased.

> "[I]t is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, *will be protected by appellate courts when infringed by trial courts.*" *Sacher v US*, 343 US 1, 9 (1952). (emphasis added)

But here in the 6th Circuit Court of Appeals Appellant was not able to have his questions answered so he could reverse summary judgment and recover his civil rights case. Thus his Equal Protection and other rights listed above have been violated.

Consider a prior pro se petition seeking review of this very question.

Other pro se litigants have been denied their due process rights on appeal by not having their questions answered.

It is from the same district court - the Western District of Michigan - and in the 6th Circuit. On Petition to this Court essentially the same question was presented for review when the 6th Circuit refused to answer the pro se appellants questions and instead affirmed on irrelevant grounds it picked. See *Luther v Burton*, (Pet. #02-343) (6th Cir #01-2232) (Luther charged Burton, a probation officer, violated his civil rights when he persuaded and conspired with a judge to bar Luther from Kent County for 14 months with a probation order, and, therefore, from seeing Luther's children and living where he wanted to.) That civil rights question was:

"1. Whether pro se litigants as a protected class under 28 USC 1654 enforcing Constitutional rights under 42 USC 1983 *have a constitutional right to have the questions they raise on appeal fully and fairly addressed and decided on the merits* before affirmance and preclusion doctrines are applied and their rights lost?" (emphasis added)

The 6th Circuit stated in their order on appeal:

"In his timely appeal, Luther argues that: (1) he was denied discovery; (2) the district court judge was biased against him; (3) Burton's actions constituted "triple jeopardy;" and (4) Burton was not entitled to qualified immunity." (*Luther*, App p 2)

But on par the panel refused to answer any question. Instead they concluded:

"Luther did not counter that proof. In sum, Luther failed to present evidence on which a jury could reasonably find for him and against Kent County and Burton."

The truth is the appeal was a farce. It was pay your money three times, slam the door shut three times and that is all the due process you get. They were deliberately indifferent to the fact Luther did not have any discovery to counter the allegations. They violated his fundamental right to a jury trial. (7th Am.) They told him to flush his civil rights on appeal.

Obviously, the problem has not gone away. But in the mean time how many pro se litigants have come

to the 6th Circuit, or one of the others, and been repeatedly denied justice on appeal, like they have been in state courts? Is it error or deliberate? (This Court does not correct errors. Rule 10.) Pro se litigants know it is not error. It is flat out prejudice.

Discriminating against pro se appellants does not have the appearance of justice.

The burdens of appeal for a pro se appellant are substantial in time, energy and court requirements, plus costs. This burden would not have been Petitioner's if the lower court had been just. But to now also deny a fair hearing on the merits of his appeal does not have any "appearance of justice" at all. *Aetna Life v Lavoie*, 475 US 813, 827-828 (1986).

II.

REASONABLE PERSONS COULD CONCLUDE THAT JUDGES HAVING CLOSE ASSOCIATIONS WITH EACH OTHER ARE BIASED IN FAVOR OF EACH OTHER AND THEREFORE SHOULD BE DISQUALIFIED.

Petitioner is solidly convinced that the Court of Appeals judges are biased in favor of the District Court judge and, therefore, Defendants, one of who is also a judge, and are biased against pro se litigants as a class and him specifically in this case.

The lower court judge in this case is Robert Holmes Bell. (See App C, 8a) The 6th Circuit judges are Judges Kennedy, Batchelder, and Griffin. (App A, 1a) The first two served with Judge Bell by appointment on numerous panels, some of which are listed below. Judge Griffin served on the Michigan Court of Appeals that covers much of the same area as the Western District of Michigan for many years and no doubt has

long known Judge Bell and possibly has been a bar member with him and had other associations.

Petitioner contends these relationships and associations between these judges have created an unconstitutional bias in favor of Judge Bell and against his appellate and constitutional enforcement rights and interests. The bias is more obvious in other parts of this petition. It is not the goal in this section to prove bias, but to argue its great probability. If it is reasonably probable, it is unconstitutional and in violation of the intent of Congress. (See 28 USC 453 & 455)

For the most part the judicial branch is unregulated, unhindered and almost unlimited. In the wrong hands it is damaging to civil rights, as in this case and the state case before it.

"There is probably no governmental power that may not be exerted to the injury of the public." *Champion v Ames*, 188 US 321, 363 (1903) The judicial power has injured the Petitioner in this case. The judicial power of injury to *pro se* litigants has not often been considered, if ever. Petitioner asks that it be considered in this case. The injury is judicial bias against a pro se litigant (not just one, but many). The state case was filled with judicial bias against Petitioner, as is the federal case.

Petitioner on rehearing en banc moved to disqualify all judges who had sat on a panel with the District Court judge or who knew him. Not one did.

Consider these facts concerning the district court judge serving with the court of appeals judges.

Judge Kennedy with District Judge Bell on 6th Cir panels.

Todd v Stegal, (00-22-3) 40 Fed Appx 25 (4-12-02)

Arrambide v Wal-Mart Stores, Inc.,
33 Fed Appx 199 (4-4-02)
El-Nobani v US, 287 F.3d 417 (4-4-02)
US v Ali, 38 Fed Appx 220 (3-26-02)
US v Hawins, 31 Fed Appx 304 (3-25-02)
Detroit Typo. Union v Detroit News,
283 F.3d 779 (1-23-02)
US v Colbert, 55 Fed Appx 225 (2-12-02)
Cowan v Paul Revere Life, 30 Fed Appx 384 (2-11-02)
Zobel v Tate, 36 Fed Appx 772 (2-11-02)
Idusuyi v Tenn. Dept., Child Serv.,
30 Fed Appx 398 (2-11-02)
Mullins v Toyota Motor Mfg., 28 Fed Appx 479
(1-19-02) (pro se)
Marbly v Mayor of Southfield,
26 Fed Appx 536 (1-28-02) (pro se barred from filing civil rights suits)
Wilson v Wilkinson, 28 Fed Appx 465 (1-28-02)(pro se)
Dorsey v Wal-Mart, 28 Fed Appx 468 (1-28-02) (pro se)
Johnson v Lockheed Martin Energy Sys.,
26 Fed Appx 537 (1-28-02)(pro se sj)
US v Gulley, 29 Fed Appx 228 (1-25-02)
Warren v Doe, 28 Fed Appx 463 (1-25-02)
(denied transcripts)
Thomas v Pleasant, 28 Fed Appx 436 (1-24-02)
(denied transcripts)
US v McClellan, 30 Fed Appx 340 (1-24-02)

Judge Batchelder and District Judge Bell on 6th Cir panels

US v Funk, 534 F.3d 522 (7-22-08)
US v Funk, 477 F.3d 421 (2-22-07)
Qeraxhiu v Gonzales, 206 Fed Appx 476 (11-15-06)
US v Washington, 199 Fed Appx 521 (10-10-06)

US v Whitmore, 193 Fed Appx 568 (8-25-06)
US v Griffith, 193 Fed Appx 538 (8-24-06)
US v Wagner, 193 Fed Appx 463 (8-23-06)
US v Morris, 193 Fed Appx 475 (8-23-06)
Abdallah v Gozales, 193 Fed Appx 408 (8-22-06)
Hughes v Sanders, (05-3945) (date ?)
Ky. Rest. Concepts Inc. v City of Louisville,
110 Fed Appx 678 (10-6-04);
Nixon v Belmont-Harrison Juvenile Dist.,
113 Fed Appx 51 (9-7-04)
Trollinger v Tyson Foods, 370 F.3d 602 (12-11-03)
Coomer v Bethesda Hosp., Inc. 370 F.3d 499 (12-17-03)
Jeffrey Chain v Topodyne Corp.,
93 Fed Appx 880 (3-31-04)
Dietz v Sanders, 100 Fed Appx 334 (3-31-04)
US v Thompson, 361 F.3d 918 (12-11-03)
Kriegish v Lipan, 97 Fed Appx 4, (2-23-04)
US v Soyk, 85 Fed Appx 448 (12-22-03)
Micakovic v Ashcroft, 85 Fed Appx 424, (12-16-03)
US v Cordell, 87 Fed Appx 475 (12-16-03)
US v Stotts, 84 Fed Appx 607 (12-15-03)
People v Jones, 84 Fed Appx 602 (12-15-03)
Cummings v US, 84 Fed Appx 603 (12-15-03)
Whittaker v US, 84 Fed Appx 609 (12-15-03)
Fed. Express Corp. v Hodges,
85 Fed Appx 412 (12-15-03)
Marasevic v INS. 86 Fed Appx 817 (12-15-03)
US v Lasley, 84 Fed Appx 617 (12-5-03)
Carr v Sweeny, Inc., 84 Fed Appx 633 (12-15-03)
Bilderbeck v US, 101 Fed Appx 569 (12-12-03)
Page v Metro Sewer Dist., 84 Fed Appx 583 (12-12-03)
Kennedy v Comm'r of SS, 87 Fed Appx 464 (12-12-03)
US v Medley, 85 Fed Appx 410 (12-12-03)

Note also that Judge Bell sat on panels before Judge Batchelder was appointed to the Court of Appeals in 1991. He sat panels in the following cases where Batchelder was the district judge whose case was being appealed.
US v Clark, 928 F.2d 733 (3-21-91)
US v Razsi, 897 F.2d 530 (3-5-90)

In 1991 Batchelder sat on a case where Bell was the district judge being appealed from. *Carlton v La Forrest*, (91-2025) (1-27-92) (a prisoner charged that corrections officer interfered with his access to court and mail. Bell ruled that because the prisoner had not *timely* objected to the magistrate's recommendation he lost his right to appeal.) (Note the time to object to a magistrate is only 10 days. That is hardly enough time for a prisoner to even get the mail let alone respond when the guards are messing with him and his mail to an undetermined extent.)

Note that Judge Bell was sitting on this case decided on March 26, 2008. The *Funk* 6th Cir case above was decided shortly thereafter on July 22, 2008. Note also that the first *Funk* case was decided February 22, 2007. Then note the Index of Appendices and the dates there relative to the magistrate and district court judge decisions in the same time frame of 2007. Did the judge give a head's up to his friends at the court of appeals, judges and clerks office, that a "bad one" is coming?

The test that needs to be applied is did the court of appeals display a "deep seated favoritism" for the lower court judge (and possibly for Defendant lawyers, state judge and public officials) and against pro se plaintiff that made "fair judgment impossible" *Liteky v*

US, 510 US 540, 555 (1994) and, if so, should they have disqualified themselves?

A second test should also be applied. Did the Court of Appeals make a detailed *de novo* review of the record, including appellant's brief and filings and come to the correct conclusion a reasonable neutral decisionmaker would find?

The rules for recusal are clear and well established. "A judge *must* recuse himself 'in any proceeding in which his impartiality might reasonably be questioned' or where 'he has a personal bias or prejudice concerning a party. 28 USC 455 (a), (b)." (emphasis added) *US v Arhebaman*, 04-1462, (6th Cir 2006 unpublished) p 5. See 28 USC 144, 453, 455.

The question in this case is not "bias . . . concerning (only) a party." There is prejudice for the Defendant lawyers, judge and local government. But there is also substantial prejudice in favor of the lower court judge. The issue is, assuming prejudice by association, whether an appellate judge having a personal bias for a lower court judge must disqualify him or herself. According to the same lower court, an "association" can be grounds for disqualification.

> "Disqualification must be based 'upon extrajudicial conduct rather than on judicial conduct' and upon a 'personal bias as distinguished from [a] judicial one, arising out of the judge's background and association and not from the judge's view of the law.' *Green v Nevers*, 111 F.3d 1295, 1303-04 (6th Cir 1997) (internal quotations and citations omitted.)" *Id.* p 5.

Apparently according to the above court even a severe "judicial" bias is not grounds for recusal. That seems to conflict with *Likety v US*, 510 US 540 (1994).

Petitioner believes the record and decision proves that the court of appeals panel displayed a "deep seated favoritism" for the lower court judge, whom they had sat on many panels with before, and that made "fair judgment impossible" for the pro se appellant. *Liteky v US*, 510 US 540, 555 (1994) The panel judges should therefore have disqualified themselves.

Petitioner on rehearing en banc moved to disqualify all judges who had sat on a panel with the District Court judge or who knew him. Not one did. Not one voted to rehear the case. But neither did they mention the motion. (See App L, 52a) The panel recorded a whopper, contending they had already considered the 7 questions raised when they knew full well they had not considered any of them.

Petitioner does not recall this Court deciding any case of bias against pro se litigants. Bias in favor of a judge is bias against the pro se appellant in this case. Judicial bias against pro se litigants is common. It happens all the time in courts, state and federal. But it is unconstitutional violating both the First and Fourteenth Amendment and 28 USC 1654, 453, and 455.

For these reasons strict scrutiny should be applied on review of the court of appeals decision, the clerk's decisions and the en banc decision.

The lower court held it did not have jurisdiction to decide the case because of *Rooker/Feldman*. The famous (infamous with Petitioner and other civil rights plaintiffs) *Rooker v Fidelity Trust*, 263 US 413, 44 S Ct 149, 68 L Ed 362 (1923) case was only decided on

motion to dismiss. But one of the few issues raised was the bias of the state judge who became trustee of large amounts of stock related to the trust party as a result of the death of the owner. The court (mistakenly?) held that the judge *did not* have a "disqualifying interest in the case" and granted the motion to dismiss. (Petitioner has heard that having one share of stock in a company whose case is before the court is sufficient for disqualification of a judge. See also 28 USC 455 (b)(4)).

The Court is virtually the only branch that can decide whether these associations are harmful to the cause of JUSTICE. It can only be decided in the context of a case. This case has all that is necessary to decide the issue and is ripe for review.

III.
PROSECUTORIAL IMMUNITY FOR PRIVATE FOR-PROFIT ATTORNEYS IS RIPE FOR REVIEW AND SHOULD BE REVERSED.

In regard to the prosecutors and other defendants in this case the magistrate noted correctly *"Plaintiff* then asserts his belief that he *was the victim of a conspiracy and retaliation in the state courts."* (emphasis added) (App F, 34a) The malicious prosecution by the Township and its private for-profit attorneys who prosecuted him without regard for his civil rights and jurisdiction are responsible and liable for their acts. Private persons acting under color of law are liable for civil rights violations. *Soldal v Cook County,* 506 US 56 (1992) The Court has not granted immunity to private civil rights violators that Petitioner is aware of and neither has Congress.

"There is, of course, quite a difference in the relationship between law partners and associates

> in private law firms and lawyers representing the government." *US v Caggiano*, 660 F.2d 184, 190 (6th Cir 1981)

Only this Court can decide whether for-profit private attorneys receive absolute prosecutorial immunity, as the lower courts ruled. It is an extremely important issue the Court should decide because it appears to conflict with this Court's prosecutorial immunity and other related rulings. There is no dispute that the attorneys are private practice attorneys paid hourly by the Township. The evidence is in the record.

Review of the *Imbler Pachtman* decision.

Five members of this Court held in *Imbler* v *Pachtman*, 424 US 409 (1976) that prosecutors within narrow limits were absolutely immune from damages liability in civil rights actions authorized by the 14th Am.

> "We hold *only* that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under sec 1983." *Id.* at 431. (emphasis added)

But Justice White with two other judges concurring in the judgment held that *no immunity should be extended to a prosecutor that withholds evidence*, as is true in this case. *Imbler*, at 433. (It also violates Michigan Rules of Professional Conduct (MRPC) 3.4(a) in addition to *Brady v Maryland*, 373 US 83 (1963).)

They also correctly noted that "there is no language in 42 USC 1983 extending *any* immunity to any state officials . . ." *Id.* at 434. (emphasis original) Therefore, all immunity is court created, not legislatively created, and therefore should be subjected to strict scrutiny, since it crosses the line of separation

of powers. At the very least the burden of proof necessary to secure the immunity should be carried by the party seeking it.

Even the *Imbler* majority believed that prosecutors should be prosecuted for withholding evidence. See *Id.* at fn) (Michigan rarely prosecutes any attorney and would never prosecute one on the complaint of a pro se litigant. They will *not even investigate* pro se complaints to the Attorney Grievance Commission.)

Burns v Reed, 500 US 478, 486-487 (1991) stated: "The presumption is that qualified immunity rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," and therefore courts are "quite sparing" in extending absolute immunity. (citations omitted) (Some judges, maybe, but not these. They distribute such immunities liberally and frequently.)

The prosecution and immunity in the lower courts.

The District Court admitted the attorneys prosecuted the case (App C, 10a) but only said a little about the Plaintiff's evidence and affidavits:

> "Plaintiff alleges that the ordinance was void and unconstitutional, that the ordinance was not properly enacted under state law, and that attorneys Leisman and Brown were not authorized to represent the township." (App C, 11a)

The District Court said while granting attorney fees:

"Plaintiff's second objection is merely a

> reiteration of the allegations already reviewed and rejected by this court. Plaintiff persists in accusing his opponents of making false statements to the state circuit court and with having *ex parte* conferences with the judge. He asserts that the defendants 'used unethical and unconstitutional conduct to win the state case.' (Objections at 2)." (App H, 39a)

Plaintiff proved these accusations in his filings and objections, but neither the judge nor magistrate would acknowledge these facts.

The 6th Circuit only admitted that:

> "Kennedy alleged that he was 'wrongfully charged and convicted' of violating a Grattan zoning ordinance. He argued that the ordinance had been repealed, and that Leisman and Brown knew or should have known that the ordinance was void or unconstitutional. He also claimed that: 1) all of the defendants conspired to violate his constitutional rights by 'prosecuting' him pursuant to an invalid zoning ordinance; and 2) defendants Leisman, Brown, and MMBJ were not authorized to act as prosecutors. "(App A, 2a)

Without regard for opposing authority, the magistrate and district court both ruled the private for-profit attorneys have prosecutorial immunity. The convincing opposing arguments should have carried the weight of law and facts on the issue and defeated this immunity at birth.

On appeal, prosecutorial immunity was raised and opposed by Appellant. (See Question #4, p 14) The

attorneys defended by arguing in support of the immunity. But the Court of Appeals cleverly evaded the issue, as it did all the others raised by Appellant. It did not mention the issue in their decision, accept for acknowledging the issue was raised and decided by the magistrate. (App A, 2a) Instead they attempted to affirm that decision by *res judicata,* an issue never raised before. (App A) By refusing to reverse the 6th Circuit has let the prosecutorial immunity stand and be used as precedent by other district courts in the 6th Circuit against all pro se civil rights plaintiffs.

The evidence in the record reveals the private attorneys are hourly paid. That is not disputed. But neither the magistrate nor district court will admit or discuss these facts at all. They have avoided them like the plague, like they do all facts favorable to plaintiff. All are good reasons why this Court should review this issue and this case.

The primary decision on prosecutorial immunity is that of the magistrate. Note the magistrate was granting the attorneys immunity before the Plaintiff even had a chance to respond to the motion to dismiss or have any discovery. The attorneys moved for dismissal and the magistrate ordered a response. (App K, 51a) Plaintiff requested time for discovery and extension of time to respond. The magistrate flew off the handle and falsely contended that he was trying to "extend" time for discovery. (App F, 32a-35a) In doing so he clearly proved his bias in favor of granting the attorneys prosecutorial immunity. (App F, 34a)

In recommending summary judgment and immunity the magistrate's discussion was more extensive. (App E, 24a-27a) But he did not discuss opposing arguments and did not find facts favorable to

the nonmovant as is required in summary judgment even though he knew that is what he was supposed to do. (App E, 24a)

The District Court just touched the issue, but accepted the magistrate's recommendation. (App C, 11a-12a)

The Court should decide whether the pecuniary interest of private for-profit attorneys disqualifies them from immunity.

There is no dispute that the attorneys are private and that they billed hourly for their prosecution of Petitioner, even though the lower courts will not admit it directly. This alone should be sufficient to deny prosecutorial immunity and review this case.

This Court held *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) that: "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an *interest* in the outcome." (emphasis added)

Congress has barred judges from having a financial interest. (Pet. p 2)

> "The framers of section [28 USC] 455 laid down a per se rule where financial interests are concerned, so that even the slightest financial stake in the outcome of litigation—on the part of the judge, his spouse, or minor child—would disqualify the judge." *In re city of Houston*, 745F.2d 925, (1984)

The same should be true of prosecutors. The monetary interest in the proceedings is enough to question whether the official can be unbiased. The

record proves these so called prosecutors were not unbiased in any respect. How could they be? They are for-profit attorneys.

Petitioner is not aware of any case where this Court has held that private attorneys paid by local government and acting as prosecutors have absolute prosecutorial immunity.

This important question is ripe and should be decided now, since the lower courts have ruled they do have prosecutorial immunity. In Michigan there are literally hundreds of these private attorneys acting as prosecutors and doing substantial injustice in the process of profiting from it. It is difficult for pro se litigants to oppose attorneys as it is, and this case has been here once before and it is highly unlikely that another one addressing this issue will be here for a long time, considering the work and expense.

This Court has never held that prosecutors without jurisdiction are absolutely immune.

Proof of jurisdiction is the burden of the plaintiff. The prosecutor has to prove jurisdiction in a criminal case. But here these attorneys knew they did not have jurisdiction and also withheld evidence of lack of jurisdiction so they could win a conviction and feather their own nests by an unconstitutional trial and appeals thereof.

> "And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit." *Dred Scott v Sanford*, 60 US 393, 428 (1857)

Prosecutors who conspire with judges in *ex parte* conferences should not have any immunity either. (See facts and evidence: Doc. #32, p 4, & ref. See Doc. # and Kennedy. Aff's)

The 9th Amendment protects the right of the people to decide who shall be prosecutors and Defendant attorneys do not qualify.

The 9th Am (Pet. p 1) grants rights to the people of Michigan to decide who its leaders are and how they come to office. The Michigan Constitution provides that prosecutors are elected. These attorneys do not meet any condition. It does not include private attorneys.

Michigan Constitution Article VII sec 4 states that a prosecutor is elected in each county. (Pet. p 3) It does not say that Townships may hire any attorney they want. It does not give them any power to prosecute.

The Michigan Constitution is the Supreme Law of the State. The "Supreme Power resides in the body of the people." *Chisholm v Georgia*, 2 US (2 Dall) 419, 457; 1 L Ed 440 (1793) That power should not be overcome.

The attorneys were not elected in Kent County or the Township. In fact, there is no evidence they even live in the Township. Without being elected they cannot be prosecutors in Michigan. Plus they cannot serve two masters - their business and that of the public. The people and Michigan Constitution do not allow it.

The Court can review other cases where attorneys that have been granted broad prosecutorial immunity that are precedents in this and other circuits.

The magistrate stated even prosecutors with evil motives are immune. "The immunity doctrine shields prosecutors even if they act 'maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence.'" (See citations at App E, 26a) This conflicts with the narrow of immunity in *Imbler*.

The 6th Circuit has also apparently held that "attorneys for a municipality who pursue a civil action for public nuisance and ordinance violations are also entitled to absolute immunity 'when their duties are functionally analogous to those of a prosecutor's regardless of whether those duties are performed in the course of a civil or criminal action.'" (See citations at App E, 25a)

Attorneys can even cause the destruction of buildings without compensation in violation of the 5th Amendment and with absolute immunity according to the 6th Circuit. (Id.)

With immunity grants this broad, is any one liable under 42 USC 1983? If all are immune, there is no remedy.

There is great difficulty in enforcing pro se Constitutional rights in the state and federal courts as this case demonstrates and that is another reason to review and reverse.

IV.

ATTORNEY FEES GRANTED AGAINST PRO SE CIVIL RIGHTS PLAINTIFFS NEED STRICT SCRUTINY.

For exercising his 1st & 14th Amendment rights, Petitioner has been hit with almost $10,000 for Defendants attorney fees. (App H, 37a; I, 40a; J, 41a) How does that encourage the enforcement of civil rights in accord with the 14th Amendment command?

Attorney fees hurt the cause of Constitutional rights enforcement. They are punitive and retaliatory as here, to pro se civil rights plaintiffs. *Board of County Commissioners, Wabaunsee County, Kansas v Umbehr*, 135 L Ed 2d 843, 116 S Ct 2342, 2347 (1996) (retaliation for exercise of fundamental rights violates Constitution.)

Attorney fees should be subjected to strict scrutiny because of the fundamental rights at risk. *Rublee v Fleming*, 160 F.3d 223, 217 (5th Cir 1998)

CONCLUSION

The petition for writ of certiorari should be granted on all questions.

Respectfully submitted,

_____ January ___, 2009

Michael M. Kennedy
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Supreme Court, U.S.
FILED

08-976 JAN 23 2009

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT of the UNITED STATES

MICHAEL M. KENNEDY,
Petitioner

v

GRATTAN TOWNSHIP, MICHIGAN,
et al, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE 6TH CIRCUIT

APPENDIX
&
Index to Appendices

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-1595

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed Mar 26, 2008 LEONARD GREEN, Clerk

MICHAEL M. KENNEDY
Plaintiff-Appellant,

v.

GRATTAN TOWNSHIP; LANA GREEN; DAVID MUNSON; RICHARD A. HERWEYER; PAUL KNOERL; DENNIS HEFFRON; ROSS LEISMAN; JAMES R. BROWN; MIKA. MEYERS, BECKETT & JONES PLC,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ORDER

Before: KENNEDY, BATCHELDER, and GRIFFIN. Circuit Judges.

Michael M. Kennedy proceeding pro se appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. §§ 1983 and 1985. This case has been referred to a panel of the court pursuant to Rule 34(j)(1) Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and declaratory relief, Kennedy sued Grattan Township (Grattan), Grattan officials (Lana Green, David Munson, Richard Herweyer, Paul Knoerl, and Dennis Heffron), state district judge Steven R. Servaas and attorneys Ross Leisman and James Brown and their law firm Mika, Meyers, Beckett & Jones (MMBJ). Kennedy alleged that he was "wrongfully charged and convicted" of violating a Grattan zoning ordinance. He argued that the ordinance had been repealed, and that Leisman and Brown knew or should have known that the ordinance was void or unconstitutional. He also claimed that: 1) all of the defendants conspired to violate his constitutional rights by "prosecuting" him pursuant to an invalid zoning ordinance; and 2) defendants Leisman, Brown, and MMBJ were not authorized to act as prosecutors.

Defendants Leisman, Brown, and MMBJ filed a motion to dismiss or for summary judgment. A magistrate judge filed a report recommending that the district court grant summary judgment in favor of the movants because they were entitled to prosecutorial immunity, and because Kennedy's claims had been litigated and rejected in the Michigan state courts and were therefore barred by the *Rooker-Feldman* doctrine and collateral estoppel. The magistrate judge also recommended that the district court grant the defendants' motion for attorneys fees. Thereafter, the remaining defendants filed a motion for summary judgment and a motion for attorneys fees. Over Kennedy's objections, the district court adopted the magistrate judge's recommendation, granted each of the defendants' motions for summary judgment dismissed Judge Servaas for lack of service of process, and granted the defendants' requests for attorneys fees. Kennedy has filed a timely appeal, essentially reasserting his claims. He requests oral argument in this appeal.

Upon review, we conclude that the district court properly granted summary judgment to the defendants. We review de novo a district court's grant of summary

judgment using the same test as used by the district court. *Lucas v. Monroe County*, 203 F.3d 964, 971 (6th Cir. 2000). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Covington* v. *Knox County Sch. Sys.*, 205 F.3d 912, 914 (6th Cir. 2000). Once the moving party has met its burden of production, the non-moving party must come forward with significant probative evidence showing that a genuine issue exists for trial. *Id.*

The defendants met their initial burden of establishing that they were entitled to summary judgment. Each of the defendants was entitled to summary judgment on Kennedy's claims because the claims were precluded by Michigan's doctrine of res judicata. Federal courts must give the same preclusive effect to state court judgments as those judgments would receive in the courts of the rendering state. *See Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 80-85 (1984). This principle applies to civil rights actions under 42 U-S.C. § 1983 with respect to issues actually litigated in the state courts, *see Allen v. McCurry*, 449 U.S. 90, 97-99 (1980), as well as those issues that were not raised but could have been litigated in the state court proceeding. *See Migra*, 465 U.S. at 84. Under Michigan's doctrine of res judicata, a subsequent legal action is barred if: 1) the first action was decided on the merits; 2) the matter contested in the second case was or could have been resolved in the first case; and 3) both actions involve the same parties or their privies. *See Smith, Hinchman and Gryli, Assocs,. Inc. v. Tassic*, 990 F.2d 256, 251-58 (6th Cir. 1993). Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated. *See Katt v. Dykhouse*, 983 F.2d 690, 693 (6th Cir. 1992).

In this case, the record reflects that Kennedy's

challenges to his prosecution for violating the zoning ordinance were fully litigated and rejected in the state courts. The Kent County Circuit Court concluded that the trial court's findings of fact were overwhelming, that the zoning enforcement officer had the authority under state law to issue a citation to Kennedy, and that the township attorneys had the authority to prosecute the civil action under Michigan law. The court also rejected Kennedy's motion for reconsideration concluding that the trial court's findings were not clearly erroneous; the ordinance had not been repealed; and the citation for violating the ordinance was properly signed and served as a sworn complaint. Kennedy is barred from raising his claims in federal court because be litigated them in the state courts, and because the District Court for Kent County rejected his claims.

Kennedy points out that not all of the defendants were parties to the state court action. However, under Michigan law where collateral estoppel is being used defensively, the mutuality requirement does not apply. *Monat v. State Farm Ins. Co.*, 611 N. W. 2d 843, 850 (Mich. 2004); *see also McCormick v. Braverman*, 451 F 3d 382, 391 (6th Cir. 2006). Because we have concluded that the district court properly granted summary [sic] on preclusion grounds, we need not address the court's discussion of the *Rooker-Feldman* doctrine.

In addition, the district court properly granted summary [sic] to the defendants on Kennedy's conspiracy claim. Such a claim requires a showing that the defendants engaged in a conspiracy to deprive a class of persons of the equal protection of the laws, and that the conspiracy was motivated by racial or some other-class-based animus. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Collyer v. Darling*. 98 F.3d 211, 233 (6th Cir. 1996). Kennedy failed to allege that he was discriminated against on the basis of any such class-based discriminatory animus.

The district court properly dismissed the complaint against Judge Servaas for lack of service of process. We

review a district court judgment dismissing a complaint for failure to effect timely service of process for an abuse of discretion. *See Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996) (applying the former Rule 4(j); *cf. Rose* v. *Soc. Sec. Admin.*, No. 98-6491, 1999 WL 1253074, at **1 (6th Cir. 1999) (unpublished) (applying this standard to the current Rule 4(m). A district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard. *See Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995). The time limit for service of process on an individual defendant is 120 days. *See* Fed. R. Civ. P. 4(m).

Here, a review of the record does not reflect that Judge Servaas had been served with process in compliance with Fed. R. Civ. P. 4(m). The 120-day period for service had passed and Kennedy failed to show good cause for the failure to achieve service. Thus, Judge Servaas was properly dismissed.

Finally, the district court did not abuse its discretion when it granted the defendants' motions for attorneys' fees. *See Tahfs v. Proctor*. 316 F.3d 584, 594 (6th Cir. 2003). Kennedy's liability for attorneys' fees arises from 42 U.S.C. § 1988, which provides that a district court has discretion to award attorneys' fees as part of the costs to the prevailing party. "An award of attorney fees against a losing plaintiff in a civil rights action "is an extreme sanction and must be limited to truly egregious cases of misconduct.'" *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001) (quoting *Jones* v. *The Continental Corp.*, 789 F2d 1225, 1232 (6th Cir. 1986). Accordingly, a prevailing defendant should recover only if the district court finds that the original complaint was frivolous, unreasonable, or without foundation. *Wayne v. Vill. of Sebring*, 36 F.3d 511, 530 (6th Cir. 1994).

In this case, the district court reviewed the plaintiffs complaint and concluded that awarding attorneys' fees to the defendants was appropriate, because Kennedy had a full and fair opportunity to litigate his claims in the state courts

and was attempting to use the federal court retaliate against anyone involved in the state court litigation. Because Kennedy's lawsuit is frivolous and without foundation, the district court did not abuse its discretion in granting the defendants' motion for attorneys fees.

Accordingly, we deny the request for oral argument and affirm the district court's judgment.

Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

APPENDIX B

Case No. 07-1595

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

MICHAEL M. KENNEDY,
Plaintiff-Appellant

v.

GRATTAN TOWNSHIP; LANA GREEN; DAVID MUNSON; RICHARD A. HERWEYER; PAUL KNOERL; DENNIS HEFFRON; ROSS LEISMAN; JAMES R. BROWN; MIKA, MEYERS, BECKETT & JONES PLC
Defendants -Appellees

Upon consideration of the appellant's motion for an extension of time to file his appendix, it is ORDERED that the motion be and it-hereby is DENIED. The Court sua sponte waives the filing of a joint appendix, the Court will rely on the lower court record.

It is also ORDERED that the request to file a corrected and indexed appellant brief is DENIED.

Issued: February 07, 2008
ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk
/s/ ?_____

APPENDIX C
Case 1 :O6-cv-00657-RHB-JGS Document 40
Filed 04/10/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVSION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :06-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

OPINION

Plaintiff, Michael M. Kennedy, brings this civil rights action against Grattan Township, officers and agents of the township, and state District Judge Steven R. Servaas pursuant to 42 U.S.C. §§ 1983 and 1985. The factual predicate for plaintiff's claims is an ordinance enforcement case brought in the 63rd District Court by Grattan Township to force plaintiff to remove thirty derelict vehicles from his property. Defendant Judge Servaas conducted a bench trial and ultimately entered judgment on behalf of the township and against plaintiff. The Kent County Circuit Court, Honorable James Redford, affirmed the district court judgment on direct appeal in two extensive written opinions. Thereafter, the Michigan Court of Appeals and Supreme Court denied leave to appeal.

Plaintiff initiated this action in September 2006, seeking an award of damages in the amount of $75,000 against all defendants, jointly and severally, in addition to an award of punitive damages and other relief. In addition to naming Judge Servaas and Grattan Township as defendants, plaintiff's *pro se* complaint named attorneys

Ross Leisman and James R. Brown, attorneys in the law firm of Mika, Meyers, Beckett & Jones, who acted as retained counsel for the township in the state court proceedings. The complaint also named members of the township board: Lana Green, Paul Knoerl, Dennis Heffron, and Richard Herweyer, a board member and township supervisor. Finally, the complaint named David Munson, an employee of the township.

The first defendants to respond to the complaint were Leisman, Brown, and Mika, Meyers, Beckett & Jones, retained township attorneys. Those defendants filed a motion for summary judgment, raising the defenses of prosecutorial immunity and collateral estoppel. The summary judgment motion also raised the *Rooker-Feldman* doctrine. By report and recommendation entered February 14, 2007 (docket # 25), Magistrate Judge Joseph G. Scoville recommended that the motion be granted and, further, that their motion for ari award of attorney's fees pursuant to 42 D.S.C. § 1988 be granted, on the ground that plaintiff's claims against the township's lawyers are "frivolous, unreasonable, and without foundation." After issuance of the report and recommendation, defendants Grattan Township and Lana Green, David Munson, Richard Herweyer, Paul Knoerl, and Dennis Heffron (hereinafter the "Township Defendants") filed their motion for summary judgment (docket # 26), seeking dismissal on the same grounds discussed in the report and recommendation, as well as the additional grounds of legislative immunity, federal qualified immunity, and state immunity, and a motion for attorney's fees (docket # 28). Plaintiff filed objections to the report and recommendation and, after being granted an extension of time by the magistrate judge to do so, a response to the dispositive motion of the Township Defendants. As the issues raised by the report and recommendation and the motion by the Township Defendants are substantially interrelated, the court will consider all such issues in a single opinion. The court must

grant *de novo* review to timely objections of the dispositive recommendations of a magistrate judge, FED. R. CIV. P. 72(b); the matters raised in the motion of the Township Defendants are governed by the familiar summary judgment standards summarized by the magistrate judge at pages 6 and 7 of the report and recommendation.

Background Facts

The essential facts are well-documented in the record and are not subject to dispute. Plaintiff owns real property situated within Grattan Township, Michigan. The township, represented by attorneys Leisman and Brown, began enforcement proceedings in the 63-1 District Court under the township's Uniform Ordinance no. 1, which regulates land use. The enforcement proceeding arose from the allegation that plaintiff was storing over thirty junk vehicles on his property, in violation of the ordinance. The enforcement proceeding was civil in nature. Defendant Steven Servaas, a state district judge, conducted a bench trial on September 12, 2002. On September 27, 2002, he entered an order finding plaintiff responsible for violating the ordinance. The court conducted a further hearing concerning remedy and entered judgment on October 10, 2002, ordering plaintiff to pay $1,000 in fines and costs and requiring him to comply with the ordinance. Judge Servaas later taxed attorney's fees against plaintiff in the amount of $5,000 arising from plaintiff's filing of frivolous pleadings and motions. The district court's orders were affirmed on direct review by the Kent County Circuit Court in two written opinions dated December 31, 2003, and March 15, 2004. In these opinions, Judge James Redford of the Kent County Circuit Court affirmed the district court's findings of fact, upheld the statutory authority of the zoning enforcement officer and the township attorneys, and rejected all of plaintiff's other legal and factual arguments. Both the Michigan Court of Appeals and Supreme Court denied discretionary review.

Plaintiff brought this civil rights action by filing a *pro se* complaint on September 11, 2006. Plaintiff's complaint names the township and its board and supervisor, as well as Judge Servaas and the township's attorneys. Plaintiff alleges that the ordinance was void and unconstitutional, that the ordinance was not properly enacted under state law, and that attorneys Leisman and Brown were not authorized to represent the township. Each of these claims were carefully analyzed and rejected in the appellate opinions of the Kent County Circuit Court. Additionally, plaintiff brings a claim under 42 U.S.C. § 1985 for conspiracy to violate his civil rights.

By report and recommendation entered February 14, 2007, Magistrate Judge Joseph G. Scoville recommended that the dispositive motion of attorneys Leisman and Brown be granted on the grounds of prosecutorial immunity, the *Rooker-Feldman* doctrine, and collateral estoppel. Plaintiff filed a timely objection to the report and recommendation. While the report and recommendation was pending, the Township Defendants moved for summary judgment incorporating the grounds set forth in the report and recommendation and raising the additional grounds of federal and state immunity. Plaintiff has now filed a response to that motion as well. On *de novo* review of all issues, the court concludes that all moving defendants are entitled to summary judgment. Additionally, the complaint against Judge Servaas will be dismissed for failure to make service within the time allowed by Fed. R. Civ. P. 4(m), and defendants' motions for the assessment of attorney's fees will be granted.

Discussion

The thorough treatment by the magistrate judge of the issues in this case renders unnecessary a detailed reiteration of the legal principles governing this dispute. With regard to defendants Leisman, Brown, and Mika, Meyers, Beckett & Jones, PLC, the magistrate judge was

clearly correct in concluding that all damage claims against them are barred by the doctrine of prosecutorial immunity. Even though the district court action was a civil ordinance enforcement matter, the township's attorneys are entitled to absolute immunity, because their duties were functionally analogous to those of a prosecutor. *See Cooper* v. *Parish*, 203 F.3d 937, 947 (6th Cir. 2000). Plaintiff's state-law challenge to the authority of Leisman and Brown to act as township attorneys was specifically rejected by the Michigan circuit court.

Likewise, defendants are clearly entitled to the benefit of collateral estoppel arising from the judgments of the state courts. This court is required to give those judgments the same preclusive effects as do the Michigan courts. 28 U.S.C. § 1738. All of the legal and factual matters that plaintiff attempts to raise in the present action were raised and rejected in the state courts. Against this conclusion, plaintiff raises two meritless objections. First; he asserts that not all of the defendants in this case were technical parties in the state-court action. This, assertion is true, but irrelevant. Under Michigan law, where collateral estoppel is being used defensively, the mutuality requirement does not apply. *Monat* v. *State Farm Ins. Co.*, 677 N.W.2d 843, 850 (Mich. 2004). It is therefore not necessary that the defendants have been formal parties in the state district court case. Second, plaintiff argues that he did not have a full and fair opportunity to litigate these issues in the state courts. This assertion is belied by the state-court record now before this court, and especially by the careful analysis of Circuit Judge Redford.

The magistrate judge was likewise correct in concluding that the *Rooker-Feldman* doctrine bars all claims that arise from the district court judgment itself. Plaintiff's frontal attack on the judgment of the district court, his challenge to the order of the district court enforcing the township ordinance, and his objection to the imposition of fines and attorney's fees all run afoul of the *Rooker-Feldman*

doctrine.

Finally, the court concludes that plaintiff has failed to state a claim for conspiracy under 42 U.S.C. § 1985. In count 2 of the complaint, plaintiff alleges that all defendants conspired with each other to prosecute and convict plaintiff without a valid ordinance and to deprive him of money and property rights, in violation of 42 U.S.C. § 1985(3). In order to state a claim under this statute, a plaintiff must allege a conspiracy designed to deprive a person or class of persons of the equal protection of the laws. This requires a showing that the conspiracy was motivated by racial, or perhaps some other class-based, discriminatory animus. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). Plaintiff has not alleged any such class-based animus. The Sixth Circuit has squarely held that landowners challenging land use regulation are not an adequate class for purposes of section 1985. *Seguin v. City of Sterling Heights*, 968 F.2d 584, 590 (6th Cir. 1992).

For the foregoing reasons, the court finds that defendants are entitled to judgment on all claims in plaintiff's complaint. As the foregoing reasons are adequate to support the entry of judgment, the court need not reach the claims of federal and state immunity asserted by the Township Defendants.

The record shows that defendant Servaas was not served with process in this case. Plaintiff merely mailed him a proposed waiver of service pursuant to Fed. R. Civ. P. 4(d). (*See* Notice, docket # 15). The notice was never executed and returned, necessitating formal service of process. The record does not reflect that process has ever been served on Servaas, and the time for doing so under Rule 4(m) has expired. Although the court has discretion to extend this time for good cause shown, the court will not do so in this case, because a showing of good cause is not possible. It is patent from the face of the complaint that Judge Servaas has been sued because of his judicial rulings in the district court action in which he was trial judge.

Claims against him would therefore be barred by the doctrine of judicial immunity. As formal service would therefore be futile, the court will not extend the time for service, but will dismiss the case against Judge Servaas for lack of service under Rule 4(m).

Finally, the court concurs with the magistrate judge that this is one of those rare civil rights actions in which attorney's fees should be taxed against a plaintiff pursuant to 42 U.S.C. § 1988. Plaintiff is attempting to enlist the federal court as a bludgeon against his former adversaries in the district court action, as well as anyone remotely connected with enforcing the ordinance against him. Having been given a full and fair opportunity to litigate his claims in the state courts, plaintiff should not be allowed to continue litigating the same issues *ad infinitum*. The court agrees that his claims in the present case are frivolous, unreasonable, and without foundation and that an award of attorney's fees under section 1988 is proper. Defendants are directed to file detailed affidavits in support of their applications for attorney's fees within fourteen days of the entry of judgment. Plaintiff is granted seven days thereafter in which to file objections. After resolution of all objections, the court will enter a separate judgment for fees and costs.

Conclusion

The motion of defendants Leisman, Brown, and Mika, Meyers, Beckett & Jones, PLC, for summary judgment (docket # 6) and of the Township Defendants for summary judgment (docket # 26) will be granted. Plaintiff's objections to the report and recommendation of the magistrate judge will be overruled, and the report and recommendation (docket # 25) will be adopted as the opinion of the court, as amplified herein. All claims against defendant Steven Servaas will be dismissed for failure to make service pursuant to Fed. R. Civ. P. 4(m). The motion of Leisman, Brown, and Mika, Meyers, Beckett & Jones, PLC (docket #

18) and of the township Defendants (docket # 28) for an award of attorney's fees will be granted, and a separate judgment will be entered after the court considers supporting and opposing affidavits relative thereto.
Date: April 10, 2007

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE
Certified as true copy of an electronically filed document.
Ronald C. Weston Sr., Clerk, Date 4-11-07

APPENDIX D
Case 1:O6-cv-00657-RHB-JGS Document 41
Filed 04/10/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICIDGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

JUDGMENT

In accordance with the opinion issued this date:

IT IS ORDERED that plaintiff's objections to the report and recommendation of the magistrate judge (docket # 32) are hereby OVERRULED, and the report and recommendation (docket # 25), as supplemented by the court's opinion, is ADOPTED as the opinion of the court.

IT IS FURTHER ORDERED that the motions for summary judgment of defendants Leisman, Brown, and Mika, Meyer, Beckett & Jones, PLC (docket # 6), and of defendants Grattan Township, Lana Green, David Munson, Richard A. Herweyer, Paul Knoerl, and Dennis Heffron (docket # 26) be and hereby are GRANTED, and judgment is entered in favor of all moving defendants and against plaintiff on all claims in plaintiff's complaint.

IT IS FURTHER ORDERED that defendant Steven Servaas is hereby DISMISSED from this action for failure to make service pursuant to Fed. R. Civ. P. 4(m).

IT IS FURTHER ORDERED that defendants' motions for attorney's fees (docket #' s 18, 28) be and hereby are

GRANTED. The moving defendants shall file detailed affidavits in support of their request for fees within fourteen days of the date of this judgment; plaintiff is granted seven days after service in which to file objections thereto. Thereafter, the court will enter a separate judgment for attorney's fees.

IT IS FURTHER ORDERED that defendants may tax their costs.

Date: April 10, 2007

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

Certified as a true copy of an electronically filed document.
Ronald C. Weston, Sr., Clerk. Dated 4-11-07

APPENDIX E

Case 1 :O6-cv-00657 -RHB-JGS Document 25
Filed 02/14/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DMSION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

REPORT AND RECOMMENDATION

This is a civil rights action brought by a *pro se* plaintiff pursuant to 42 U.S.C. §§ 1983 and 1985. Plaintiff's complaint arises from ordinance enforcement litigation commenced by defendant Grattan Township against plaintiff in the 63rd District Court. After a bench trial, the district court entered judgment on behalf of the township in 2002, requiring plaintiff to remove thirty "junk vehicles" from his property and fining him in the amount of $1,000 for violating a township ordinance. The district court's judgment was affirmed on direct appeal by the Kent County Circuit Court, and the Michigan Court of Appeals, Michigan Supreme Court, and Supreme Court of the United States all denied discretionary review.

Plaintiff initiated the present civil rights action against Grattan Township and several of its officers, including defendants Ross Leisman and James R. Brown. Leisman and Brown are members of the law firm Mika,

Meyers, Beckett & Jones (Mika, Meyers), which acted as township attorneys in prosecuting plaintiff for the civil ordinance violation in state district court. Plaintiff's complaint alleges that plaintiff was "wrongfully charged and convicted" for violating the township zoning ordinance. (Compl. at 2). He alleges that Leisman and Brown knew or should have known that the ordinance was void or unconstitutional, but nevertheless pursued charges against plaintiff. (*Id.* at 14, 18). He further alleges that they conspired with township board members and officials and with the presiding district judge in connection with their prosecution of the case. (*Id.* at 15, 16, 19, 20). The complaint alleges that defendant Mika, Meyers is vicariously liable for the wrongful conduct of its members. (*Id.* 21). On the basis of these factual allegations, plaintiff asserts four claims against defendants Leisman and Brown and their law firm. Count 1 asserts a claim pursuant to 42 U.S.C. § 1983 arising from defendants' prosecution of plaintiff "when they had no valid ordinance" and when they knew or should have known that the ordinance violated property rights protected by the United States Constitution. Count 2 sets forth a conspiracy charge pursuant to 42 U.S.C. § 1985(3) arising from the alleged prosecution and conviction of plaintiff pursuant to an invalid ordinance and the presentation of false and invalid evidence at trial. Count 5 purports to assert a due-process claim arising from the district court judgment, which plaintiff asserts was based on an invalid ordinance and violated his right to due process of law. Count 7 alleges that defendants Leisman and Brown were not authorized by the Constitution of the State of Michigan to act as prosecutors, that they were biased in favor of their employer, and that therefore their conduct in the state courts deprived him of due process of law. For relief,

plaintiff seeks an award of compensatory and punitive damages and declaratory and injunctive relief.

Presently pending before the court is a motion by defendants Leisman, Brown, and Mika, Meyers to dismiss the complaint, FED. R. CIV. P. 12(b)(6), or for summary judgment, FED. R. Civ. P. 56. (docket # 6). The motion seeks dismissal on a number of grounds, including prosecutorial immunity, collateral estoppel, and the *Rooker-Feldman* doctrine. Defendants also seek an award of attorney's fees pursuant to 42 U.S.C. § 1988. (docket # 18) By order of reference entered September 15, 2006 (docket # 2), Chief Judge Robert Holmes Bell referred this case to me for all pretrial purposes, including the submission of a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(B). Plaintiff has filed his response to defendants' motions. (docket #' s 19, 23). Upon review of the record, I conclude that the moving defendants are entitled to judgment in their favor as a matter of law, and should be awarded their attorney's fees. I therefore recommend that defendants' motions be granted.

Proposed Findings of Fact

All of the facts necessary for resolution of the pending motion are provided by the opinions and judgments of the state courts, of which this court may take judicial notice. Those opinions and orders are attached to defendants' brief in support of their motion for summary judgment. (docket # 7).

Plaintiff Michael M. Kennedy is the owner of real estate in Grattan Township, Michigan. The township initiated a civil ordinance enforcement action, *Township of Grattan v.Michael M. Kennedy*, case no. RO1AO119 in the 63rd District Court for violation of uniform ordinance no. 1, which prohibits, among other things, the storage or accumulation of inoperable or junked vehicles for more than 48 hours, unless done pursuant to permit. Defendant Steven Servaas, District Judge, presided over the proceedings, and

defendants Leisman and Brown acted as attorneys for the township pursuant to contract with their law firm, Mika, Meyers. Judge Servaas conducted a bench trial on September 12, 2002. On September 27, 2002, he entered an order finding plaintiff responsible for violating the ordinance. (Def. Ex. B). After a further hearing concerning remedy, Judge Servaas entered a judgment on October 10, 2002, ordering plaintiff to pay $1,000 in fines and costs and requiring him to bring his real property into compliance with the township ordinance. (Def. Ex. C). By subsequent order, Judge Servaas taxed attorney's fees against plaintiff in the amount of $5,000 for plaintiff's filing of frivolous pleadings and motions. (Def. Ex. D).

Plaintiff appealed as of right to the Kent County Circuit Court.[1] In his brief on appeal, plaintiff raised six substantive and procedural challenges to the district court judgment, each of which contained sub-arguments (*see* Def. Ex. L). By opinion and order entered December 31, 2003, Circuit Judge James R. Redford analyzed and rejected each of plaintiff's appellate arguments. In summary, Judge Redford found as follows:

(1) The evidence supporting the district court's findings of fact was "overwhelming." (Def. Ex. L, 2).

(2) Plaintiff did not establish his defense of preexisting, nonconforming use. (*Id.*,2-3).

(3) The zoning enforcement officer had authority under state law to issue the citation. (*Id.*, 3-5).

(4) The township attorneys had authority to prosecute the civil infraction actions against plaintiff pursuant to Mich. Comp. Laws § 41.187. (*Id.*,4).

(5) Plaintiff's motion to disqualify Judge Servaas was both untimely and frivolous. (*Id.*, 5).

---

[1] Judgments of the Michigan district courts are reviewable on direct appeal in the state circuit court. MICH. CT. R. 7.101. Further review in the Michigan appellate system is available only by application for leave to appeal. MICH. CT. R. 7.203(B)(2), 7.301(A)(2).

(6) State law did not entitle plaintiff to trial by jury for an ordinance infraction proceeding. (*Id.*, 6).

The circuit therefore affirmed the district court's judgment.

Plaintiff filed a motion for reconsideration in the circuit court. By opinion and order issued March 15,2004, Judge Redford carefully analyzed and rejected each of plaintiff's asserted grounds, as follows:

(1) The trial court's findings of fact were not clearly erroneous. (Def Ex. F 1-2).

(2) The ordinance under which plaintiff was prosecuted had not been repealed under state law before the prosecution. (*Id.*, 2-3).

(3) The township's delay in responding to discovery requests did not provide a valid defense to the ordinance violation. (*Id.*, 3).

(4) Judge Servaas properly found plaintiff to be in direct contempt of court. (*Id.*, 3-4).

(5) The citation was properly signed and sworn to and served as a sworn complaint under state law. (*Id.*, 4).

(6) The assessment of $500 in fines and $500 in costs did not violate state law. (*Id.*, 5-6).

Plaintiff applied for leave to appeal to the Michigan Court of Appeals. By standard order entered August 19, 2004, the appellate court denied leave for lack of merit in the grounds presented. (Def. Ex. G). In a pattern now common to plaintiff's litigation behavior, plaintiff moved for reconsideration, which the court denied by standard order entered October 4, 2004. (Def. Ex. H).

Plaintiff applied for leave to appeal to the Michigan Court of Appeals. That court denied the application by standard order entered May 31, 2005. (Def. Ex. I). Plaintiff again moved for reconsideration, which was denied by the court by order entered August 30, 2005. (Def. Ex. J). The Supreme Court of the United States denied *certiorari* on

March 20, 2006. (Def. Ex. K)

This civil rights action followed.

Applicable Standard

Defendants have filed a hybrid motion to dismiss or for summary judgment. Motions to dismiss test the legal validity of a claim, and the court's analysis is limited to the well-pleaded allegations of the complaint. *See McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 405 (6th Cir. 2006). Defendant's motion goes far beyond the allegations of the complaint and relies on documents generated in the state courts. Although this court can take judicial notice of the records of the state courts, *see Lyons v. Stovall*, 188 F.3d 327, 332 n.3 (6th Cir. 1999); *St. Louis Baptist Temple. Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979), reliance on such material is inappropriate in adjudicating a motion to dismiss for failure to state a claim upon which relief can be granted. Defendants' motion is therefore considered as a motion for summary judgment under Rule 56, which allows reliance on matters outside the pleadings.

As the Sixth Circuit has noted, the federal courts have entered a "new era" in summary judgment practice. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001); *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995); *Street v. J. C. Bradford & Co.*, 886 F.2d 1472,1478-81 (6th Cir. 1989). While preserving the constitutional right of civil litigants to a trial on meritorious claims, the courts are now vigilant to weed out fanciful, malicious, and unsupported claims before trial. Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c); *Tatis* v. *US Bancorp*, 473 F.3d 672, 675 (6th Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). The standard for determining whether summary judgment is appropriate is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one

party must prevail as a matter of law.'" *See Young* v. *Township of Green Dale*, 471 F3d 674, 678 (6th Cir. 2006) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 251-52); *see also Sommer* v. *Davis*, 317 F3d 686, 690 (6th Cir. 2003).

The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Kellogg v. Sabhlok*, 471 F.3d 629, 631 (6th Cir. 2006). The party moving for summary judgment bears the initial burden of pointing out to the district court that there is an absence of evidence to support the nonmoving party's case, but need not support its motion with affidavits or other materials "negating" the opponent's claim. *Moore* v. *Philip Morris Companies, Inc.*, 8 F.3d 335, 339 (6th Cir. 1993). Once defendants show that "there is an absence of evidence to support the nonmoving party's case," plaintiff has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Audi AG* v. *D'Amato*, 469 F3d 534, 542 (6th Cir. 2006). To sustain this burden, plaintiff may not rest on the mere allegations of his pleadings. FED. R. Civ. P. 56(e); *Kessler* v. *Visteon Corp.*, 448 F.3d 326, 329 (6th Cir. 2006); *Skousen* v. *Brighton High Sch.*, 305 F 3d 520, 527-28 (6th Cir. 2002).

Discussion

I. Prosecutorial Immunity

Defendants Leisman, Brown, and Mika. Meyers have asserted the defense of prosecutorial immunity. Absolute prosecutorial immunity is a common-law doctrine that shields a prosecutor from liability under the federal civil rights laws. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). The Supreme Court has endorsed a "functional approach" for determining whether an official is entitled to absolute prosecutorial immunity, explaining that a court should look to the "nature of the function performed, not the identity of the actor who performed it." *Forrester* v. *White*,

484 U.S. 219, 229 (1988). The functional approach focuses on whether the prosecutor's activities are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Those acts that occur in the course of the prosecutor's role as an advocate for the state, such as initiation of the judicial proceedings, trial preparation, and actual case presentation in court, are protected by absolute immunity. *See Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006); *Ireland v. Tunis*, 113 F.3d 1435, 1444-45 (6th Cir. 1997). The Sixth Circuit has specifically held that attorneys for a municipality who pursue a civil action for public nuisance and ordinance violations are also entitled to absolute immunity "when their duties are functionally analogous to those of a prosecutor's regardless of whether those duties are performed in the course of a civil or criminal action." *Cooper v. Parrish*, 203 F.3d 937; 947 (6th Cir. 2000) (quoting *Shrob* v. *Catterson*, 948 F.2d 1402, 1411 (3d Cir. 1991)); *accord Smith v. Power*, 346 F.3d 740 (7th Cir. 2003) (assistant city attorney who initiated proceedings to demolish building under city building code entitled to prosecutorial immunity). "Indeed, as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense." *Cooper*, 203 F.3d at 947.

Applying the foregoing analysis, I conclude that the moving defendants are clearly entitled to the protection of prosecutorial immunity. Plaintiff's claims against the moving defendants all arise from allegations that they prosecuted him under an ordinance that they knew was invalid and that they presented false or incompetent evidence in support of the prosecution. The decision to prosecute or not prosecute, even if malicious, enjoys absolute immunity. *See Burns v. Reed*, 500 US 478, 492-93 (1991). Likewise, presentation of testimony in court, even if it is alleged to be false, is an activity intimately involved

with the judicial phase of the criminal process and therefore immune from suit. *Imbler*, 424 U.S. at 427 n. 27; *Grant v. Hollenbach*, 870 F.2d 1135, 1138 (6th Cir. 1989). Plaintiff is not aided by his allegations that the prosecutors acted with retaliatory motive or pursuant to a conspiracy. For purposes of applying the absolute immunity doctrine to the decision of a prosecutor to initiate charges, motive is immaterial. The immunity doctrine shields prosecutors even if they act "maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence." *Smith*, 346 F.3d at 742 (quoting *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986).[2] The conspiracy allegations under 42 U.S.C. § 1985(3) do nothing to change this result, as a conspiracy under section 1985(3) must be based on racial or other class-based animus. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005). Plaintiff has not alleged racial or class-based animus, nor can he on the facts of this case.

In opposition to the invocation of prosecutorial immunity, plaintiff raises a number of state-law challenges to defendants' status as prosecutors. He asserts that the defendant attorneys "are not true prosecutors under the Constitution of the State of Michigan, attorney general's opinion, state laws and common law." (Brief at 3, docket #23). The short answer to this assertion is that the state courts have already considered and rejected the identical argument.

> "The defendant likewise alleges as error the manner in which the Township attorneys were given authority to prosecute civil infractions against the appellant. Under MCL 41.187 attorneys licensed to practice law may be hired by

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[2] Although it is not necessary to the resolution of the immunity issue, I note that the state circuit court rejected all of plaintiff's claims that the ordinance had been repealed or was otherwise defective under state law.

> municipalities to carry on their legal responsibilities. The Grattan Township did specifically that in their retention of the Mika, Meyers, Beckett & Jones firm and the attorney Ross Leisman. He was acting within the scope of his office and within the scope of the directions provided to him by the Township and his actions were lawful and consistent with the authority granted to the Township by the Statues [sic] of this State. This assignment of error is without merit." (Opinion of Circuit Court dated 12/31/03, Def. Ex. E, at 4).

This holding of state law was affirmed on appeal. The states are the final expositors of their own law. *See Mulaney v. Wilbur*, 421 U.S. 684, 691 (1975). This court must therefore reject plaintiff's state-law challenge to the status of defendants as appointed township attorneys for the purpose of enforcing ordinances.[3]

The moving defendants are clearly entitled to the protection of prosecutorial immunity, and plaintiff has not advanced any reason why the doctrine should not be applied in this case. I therefore conclude that all of plaintiff's claims against the moving defendants are barred by the doctrine of absolute prosecutorial immunity.

II. Other Issues

Recognition of the immunity defense is a complete bar to plaintiff's claims against Leisman, Brown, and Mika, Meyers renders unnecessary an extensive analysis of the remaining issues raised in their dispositive motion. Nevertheless, because the other defenses are so clearly meritorious, they deserve at least brief mention as alternative grounds for dismissal of certain claims.

First, to the extent that plaintiff complains of injury

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[3] Plaintiff also asserts that the statute authorizing the hiring of private counsel by townships, MICH. COMP. LAWS § 41.187, is somehow unconstitutional. This assertion is unsupported by any applicable authority and is frivolous.

inflicted directly by the judgment of the state courts, his claims are barred by the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by "state court losers" challenging "state court judgments rendered before the district court proceedings commenced." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The doctrine applies when a plaintiff complains of injury from the state court judgment itself. *See Fieger* v. *Ferry*, 471 F.3d 637, 642-43 (6th Cir. 2006); *Coles* v. *Granville*, 448 F.3d 853, 858 (6th Cir. 2006); *see also Abbott v. Michigan*, No. 06-1434, ___ F.3d ___, 2007WL 135953 (6th Cir. Jan. 22, 2007). In the present case, at least some of plaintiff's claims (especially count 5) clearly arise from the district court judgment itself, which imposed injunctive and monetary relief against plaintiff. Indeed, plaintiff appears to especially challenge the imposition of attorney's fees against him in the district court. This was a quintessential judicial act, not the act of the attorneys representing the township. Consequently, plaintiff's claims against all defendants are barred to the extent he complains of injury from the state court judgment itself.

Furthermore, the doctrine of issue preclusion, or collateral estoppel, prevents plaintiff from relitigating issues that were finally determined in the Michigan state courts. A federal court must give a state court judgment the same preclusive effect it would have in the courts of the rendering state. 28 U.S.C. § 1738; *see McCormick v. Braverman*, 451 F 3d 382, 397 (6th Cir. 2006); *Dubuc* v. *Green Oak Twp.*, 312 F.3d 736, 744 (6th Cir. 2002). Until a Michigan judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked. *Altman* v. *Nelson*, 495 N.W.2d 826, 829 (Mich. Ct. App. 1992). The Michigan courts give collateral estoppel effect to previous judgments where (1) a question essential to the judgment was actually litigated and determined by a valid and final judgment; (2) the same parties had a full and fair opportunity to litigate the issue;

and (3) there is mutuality of estoppel. *See Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 845-46 (Mich. 2004); *see also McCormick*, 451 F.3d at 397. However, where collateral estoppel is being used defensively, the mutuality requirement does *not* apply. "[W]e believe that the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such a party has already had a full and fair opportunity to litigate in a prior suit." 677 N.W.3d at 850; *see McCormick*, 451 F.3d at 398; *Gilbert v. Ferry*, 413 F.3d 578, 581 (6th Cir. 2005). In the present case, the two applicable elements of collateral estoppel are clearly present. Plaintiff had a full and fair opportunity to litigate all issues before the state district and circuit courts, which thoroughly analyzed and rejected each claim that he now attempts to raise in federal court. The Michigan courts would give preclusive effect to the previous judgment, and this court must do likewise.

In summary, the moving defendants are entitled to judgment on the basis of the *Rooker-Feldman* doctrine and collateral estoppel, in addition to the meritorious immunity defense.

III. Award of Attorney's Fees

Attorney's fees may be awarded to prevailing defendants in civil rights litigation under 42 U.S.C. § 1988 upon a finding that the suit is frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Hughes* v. *Rowe*, 449 U.S. 5, 14 (1980); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978); *Wolfe* v. *Perry*, 412 F.3d 707, 720 (6th Cir. 2005); *N.E.* v. *Hedges*, 391 F.3d 832, 836 (6th Cir. 2004). The Supreme Court cautioned in *Christiansburg* that district courts should "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable

or without foundation." *Christiansburg Garment Co.*, 434 U.S. at 421-22; *accord Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001). The decision to grant fees for the defendant is discretionary with the trial judge, and is reviewed only for an abuse of discretion. *Riddle*, 266 F.3d at 547; *see Wayne* v. *Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994).

In the vast majority of *pro se* civil rights cases, this court does not even consider an award of attorney's fees against a plaintiff under section 1988. *Pro se* litigants often advance unsupportable claims, usually because of ignorance of the law or confusion about the merits of their cause. A special case is presented, however, when a litigant who has been given a full and fair day in court in the state system files a civil rights action not only against his state-court opponent, but the state judge, the opposing attorneys, and anyone else remotely involved in the litigation. Such cases bear the earmarks of vindictiveness and malice, and cannot be explained by confusion over the merits of a cause. After all, the state courts have patiently explained to plaintiff why his claims lack merit under the law. Cases such as this present a special need for deterrence, lest the federal courts be used as instruments to "settle the score" by disappointed state-court litigants. In these cases, the mere dismissal of the action provides no deterrent effect and invites frivolous motions for reconsideration, baseless appeals, and yet further rounds of vindictive litigation.

As demonstrated in the foregoing sections, plaintiff's claims against the township's lawyers in the state-court case are barred by the doctrine of absolute immunity, the *Rooker-Feldman* doctrine, and collateral estoppel. These claims are, within the meaning of the Supreme Court's jurisprudence on attorney's fees under section 1988, "frivolous, unreasonable, and without foundation." Despite the clear holdings of the state courts, plaintiff seeks to relitigate *ad infinitum* his entitlement to keep junk cars on his real property, in violation of township ordinances. Such conduct must be deterred by the federal courts, and some

compensation should be afforded parties who are hailed into court to answer such frivolous claims.

I recommend that the moving defendants' motion for attorney's fees (docket # 18) under 42 U.S.C. § 1988 be granted and that the court find plaintiff liable for reasonable fees. The actual assessment of fees must await the presentation of an appropriate evidentiary record after the entry of judgment. *See* FED. R. Civ. P. 54(d)(2).

Recommended Disposition

For the foregoing reasons, I recommend that the motion of defendants Leisman, Brown, and Mika, Meyers for summary judgment (docket # 6) be granted and that judgment be entered against plaintiff on all claims asserted against those defendants. I further recommend that defendants' motion for attorney's fees (docket # 18) be granted and that plaintiff be found liable for reasonable attorney's fees expended in the defense of this matter under 42 U.S.C. § 1988.

Dated: February 14, 2007

/s/ Joseph G. Scoville
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(I)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *See Thomas* v. *Am*, 474 U.S. 140 (1985); *Neuman* v. *Rivers*, 125 F.3d 315,322-23 (6th Cir.), *cert. denied*, 522 U.S. 1030 (1997); *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981).

APPENDIX F

Document 21

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No. 1:O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

MEMORANDUM OPINION

This is a civil rights action brought by a *pro se* plaintiff pursuant to 42 U.S.C. §§ 1983, 1985. The case arises from a civil ordinance enforcement action brought by defendant Grattan Township against plaintiff in the state district court involving zoning violations. Among other defendants, plaintiff has named attorneys Ross Leisman and James R. Brown, as well as their law firm Mika, Meyers, Beckett & Jones. Attorneys Leisman and Brown represented the township in the state trial court and in subsequent appellate proceedings. Leisman, Brown, and Mika, Meyers, Beckett & Jones have moved to dismiss the complaint or for summary judgment, asserting prosecutorial immunity and other defenses. By order entered December 26, 2006 (docket # 9), this court directed plaintiff to file his response no later than January 26, 2007.

Rather than filing a response to defendants' dispositive motion, on January 23, 2007, plaintiff filed "objections" to the limited time afforded to him to answer the motion and a motion to extend the time for discovery

and to answer. (docket # 19). Plaintiff's motion seeks time to complete discovery on certain alleged factual issues, including whether the moving defendants "are indeed prosecutors or fakes." By order of reference issued on September 15, 2006, Chief Judge Robert Holmes Bell referred all nondispositive pretrial matters to me for decision, pursuant to 28 U.S.C. § 636(b)(1)(A). Upon review of plaintiff's objections and motion to extend time, I find that he is not entitled to the relief sought.

A party opposing a motion for summary judgment has no absolute right to additional time for discovery. *See Wallin v. Norman*, 317 F.3d 558, 564 (6th Cir. 2003); *Lewis v. A CB Business Servs., Inc.*, 135 F.3d 389, 409 (6th Cir. 1998). In order to invoke the court's discretion in this regard, a party opposing a motion for summary judgment must file a motion for additional time under Rule 56(f), which provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment and may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). Rule 56(f), however, is "not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious." *Lewis*, 135 F 3d at 409. Rather, the affidavit of the nonmoving party must show how postponement of a ruling on the motion will enable him to rebut the motion for summary judgment. *See Allen v. CSX Transp., Inc.*, 325 F.3d 768, 775 (6th Cir. 2003). It is incumbent upon the nonmoving party to include within the affidavit a description of the discovery needed and an affirmative demonstration of how this discovery will allow

the nonmoving party to rebut the motion. *See Abercrombie & Fitch Stores. Inc.* v. *American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002).

Plaintiff has failed to meet the requirements of Rule 56(f). He has not filed an affidavit of any kind, as required by the rule. References in a brief to the need for more discovery do not qualify as a motion under Rule 56(f). *See Cacevic* v. *City of Hazel Park*, 226 F.3d 483) 489 (6th Cir. 2000); *State of California* v. *Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). Furthermore, even if the court were to construe the statements in plaintiffs brief as a proper Rule 56 motion and affidavit, they would be insufficient.

The factual issues for which plaintiff asserts the need for discovery are not material to the outcome of this case. Plaintiff first asserts his need to conduct discovery on the question whether defendants Leisman and Brown were qualified to act as city attorneys. In support of this assertion, he relies on a 1914 opinion of the Michigan Attorney General, which opined that a municipal mayor could not appoint an attorney for the city who was not an elector of the city. A township's authority to hire a private attorney to prosecute ordinance violations, however, is conferred by MICH. COMP. LAWS § 41.817, which empowers the township board to employ an attorney to represent the township in civil and criminal matters involving violation of township ordinances. The statute imposes no residence qualification. Furthermore, on direct appeal of the district court judgment, the Kent County Circuit Court specifically found as a matter of state law that Mika, Meyers, Beckett & Jones was lawfully appointed to act as attorneys for the township (*see* Def. Ex. E at 4, appended to docket # 7). As this issue was actually litigated in the state courts, plaintiff is bound by the state-court judgment on this issue under the doctrine of collateral estoppel. *See Dubuc v. Green Oak Twp.*, 312 F.3d 736, 745 (6th Cir. 2003).

Plaintiff then asserts his belief that he was the victim of a conspiracy and retaliation in the state courts. He does

not identify, however, any item of discovery in connection with these claims that might be necessary for him to meet the pending dispositive motion, which does not challenge the evidentiary basis for plaintiff's claims, but only their legal sufficiency in light of the doctrine of prosecutorial immunity and the holdings of the state courts.

Finally, plaintiff asserts his belief that the law allows him the absolute right to discovery before a dispositive motion is decided. As noted above, however, a party opposing a motion for summary judgment has no absolute right to additional time for discovery. *Wallin*, 317 F.3d at 564. Rather, the party has an affirmative obligation to demonstrate to the court how discovery might enable him to demonstrate a material issue of fact relative to the issues raised in the dispositive motion. Plaintiff has utterly failed to do so in the present case.

Plaintiff waited until the eleventh hour before seeking an extension of time in which to respond to the summary judgment motion. This suggests a lack of diligence and a desire to delay a prompt decision on the issues raised in the dispositive motion. Plaintiff has not advanced any substantial reason for further delay in this matter. The court will indulgently grant plaintiff an extension of time until February 9, 2007, in which to file a response to the pending summary judgment motion. After that time, the motion will be considered ready for decision.

Dated: January 26, 2007

/s/ Joseph G. Scoville

United States Magistrate Judge

APPENDIX G
Case 1 :O6-cv-00657-RHB-JGS Document 22
Filed 01/26/2007

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No. 1:O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

ORDER

In accordance with the memorandum opinion filed this date:

IT IS ORDERED that plaintiffs objection and motion to extend time for discovery and answer (docket # 19) be and hereby is DENIED.

IT IS FURTHER ORDERED that plaintiff shall file a response to the pending motion to dismiss or for summary judgment filed by defendants Leisman, Brown, and Mika, Meyers, Beckett & Jones no later than February 9,2007.

DONE AND ORDERED this 26th day of January, 2007.

/s/ Joseph G. Scoville United Stares Magistrate Judge

APPENDIX H

(WHICH ONE WAS THIS - NUMBER NOT ON TOP)(over 51

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

MEMORANDUM OPINION

By opinion and judgment entered April 10, 2007, this court granted judgment in favor of all moving defendants and determined that this was one of the rare civil rights actions in which taxation of attorney's fees against a plaintiff pursuant to 42 U.S.C. § 1988 was necessary as a deterrent against future litigation abuse. In accordance with the court's instructions, all moving defendants applied for attorney's fees. By report and recommendation entered May 15, 2007 (docket #51), the magistrate judge determined that the application of Attorney Craig Noland, on behalf of the Township defendants, was reasonable under the lodestar analysis endorsed by both the Supreme Court and the Sixth Circuit. The magistrate judge therefore recommended an award of fees to the Township defendants in the amount of $3,688.00. The magistrate judge conducted a detailed analysis of the application of attorney Ronald Redick, made

on behalf of the Mika, Meyers defendants, and found that the application was excessive in both hourly rate claimed and in the amount of time spent on the litigation. The magistrate judge recommended an award of statutory attorney's fees to the Mika, Meyers defendants in the amount of $4,830.00, a significant reduction from the requested amount of $9,870.00. Neither moving defendant has objected to the report and recommendation, but plaintiff has lodged timely objections. This court reviews objections to the findings of a magistrate judge on dispositive matters *de novo*. FED. R. Civ. P. 72(b); 54(d)(2)(D).

Plaintiff does not object to the lodestar analysis conducted by the magistrate judge. Rather, he raises two essential objections. First, he asserts that attorney's fees should not be taxed because of his "limited ability to pay." (Objections, docket # 52, at 2). In support of this objection, he refers to his affidavit, which he claims establishes his inability to pay. The court has reviewed plaintiff's seventeen-page affidavit (docket # 49), which is principally devoted to a representation of the merits of his case. It is a gross misrepresentation to assert that the affidavit establishes plaintiff s indigence. In passing, plaintiff avers that he is 64 years of age (P 1). This allegation accepted as true, does not necessarily establish an inability to satisfy a judgment. The affidavit also discloses that plaintiff owns fifty acres of land and that he owns collectible cars. Plaintiff has failed to establish that the taxation of fees in this case would work a hardship on him. As a legal matter, a party's inability to pay is not a proper factor to consider in determining whether to award attorney's fees. See *Wolfe v. Perry*, 412 F.3d 707, 723-24 (6th Cir. 2006). A person's ability to pay may, however, be used as a factor to determine the size of the award. *Id.* at 724. In the present case, plaintiff has not presented this court with evidence sufficient to support a finding that an award of attorney's fees totaling less than $9,000.00 would subject him to financial ruin. Furthermore, even if the award of fees would create somewhat of a

hardship, that factor must be balanced against the clear need to deter plaintiff from relitigating his state-court zoning action *ad infinitum*. In the absence of a significant sanction, plaintiff will be undeterred from raising his frivolous arguments in future cases. In summary, after considering the sketchy financial information provided by plaintiff, the court determines that plaintiff has not established grounds for a reduction in the amount of the recommended award.

Plaintiff's second objection is merely a reiteration of the allegations already reviewed and rejected by this court. Plaintiff persists in accusing his opponents of making false statements to the state circuit court and with having *ex parte* conferences with the judge. He asserts that the defendants "used unethical and unconstitutional conduct to win the state case." (Objections at 2).

Obviously, plaintiff still has not absorbed the fundamental lesson of this case: state-court judgments are not subject to collateral attack on the basis of allegations of wrongdoing or unethical conduct by the loser's opponents. Rather than providing a ground for denying fees, plaintiff's persistence in raising meritless arguments underscores the need for deterrence in this case.

Having reviewed the report and recommendation *de novo*, the court concludes that the lodestar analysis performed by the magistrate judge is correct and should be affirmed. The court further concludes that plaintiff's objections to an award of attorney's fees, or to the amount thereof, are meritless. Judgment will therefore be entered on behalf of defendants in accordance with the report and recommendation.

Date: June 6, 2007

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff

v. Case No.1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

JUDGMENT FOR ATTORNEY'S FEES

In accordance with the memorandum opinion issued this date:

IT IS HEREBY ORDERED that the report and recommendation of the magistrate judge (docket # 51), as amplified by the court's memorandum opinion, is hereby adopted as the opinion of the court and that plaintiff's objections thereto (docket # 52) are hereby OVERRULED.

IT IS FURTHER ORDERED that statutory attorney's fees are hereby taxed in favor of defendants Ross Leisman, James R. Brown, and Mika, Meyers, Beckett & Jones, PLC and against plaintiff in the amount of $4,830.00.

IT IS FURTHER ORDERED that statutory attorney's fees in the amount of $3,688.00 are hereby taxed in favor of defendants Grattan Township, Lana Green, David Munson, Richard A. Herweyer, Paul Knoerl, and Dennis Heffron.

Date: June 6, 2007
/s/ Robert Holmes Bell.
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

Certified as a True Copy of an electronically filed document.
Ronald C. Weston, Sr. Clerk, 6-6-07

APPENDIX J

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No. 1 :O6-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

REPORT AND RECOMMENDATION ON PETITIONS FOR ATTORNEY'S FEES

This was a civil rights action brought by a *pro se* litigant disappointed with the result obtained in a state-court ordinance enforcement action. By opinion and judgment entered April 10, 2007, Chief Judge Robert Holmes Bell determined that all defendants were entitled to summary judgment. The court also determined that this case "is one of those rare civil rights actions from which attorney's fees should be taxed against a plaintiff pursuant to 42 U.S.C. § 1988." (Op. at 7, docket #40). The court directed defendants to file detailed affidavits in support of their applications for attorney's fees and granted plaintiff seven days thereafter in which to file objections. Judge Bell has referred all dispositive matters to me for the entry of a report and recommendation pursuant to 28 U.S.C. § 636(b)(l)(B). (Order of Reference, docket #2). Upon review of the record, I make the following recommendations concerning the amount of attorney's fees to be taxed in favor of defendants.

Applicable Standard

Under 42 U.S.C. § 1988, in certain civil rights actions a district court may award a "prevailing party" reasonable attorney's fees as part of costs. *See Farrar v. Hobby*, 506 U.S. 103, 109 (1992). Attorney's fees may be awarded to prevailing defendants under section 1988 upon a finding that the suit was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Judge Bell has already found that plaintiff's case was frivolous, unreasonable, and without foundation and has made the discretionary judgment to grant attorney's fees against the plaintiff, principally to deter him from attempting to relitigate the zoning action that was resolved against him in the state courts. Plaintiff's objections to the taxation of fees on the ground that they are unauthorized by law, unconstitutional, unfair and otherwise inappropriate (Objections at 1-2, docket # 46) are therefore irrelevant and not properly before the court. The only open issue is the amount of attorney's fees to be taxed.

Without question, defendants are the prevailing parties in this action. After the court determines that a party has prevailed within the meaning of section 1988 and that attorney's fees are appropriate, the court must determine a reasonable fee. *See Blum v. Stenson*, 465 U.S. 886, 893 (1984). A reasonable fee is one that is adequate to attract competent counsel but does not produce windfalls to attorneys. *Id.* at 897; *see Reed v. Rhodes*, 179 F.3d 453, 471 (6thCir. 1999). A federal court's analysis of reasonableness beings with a review of the "lodestar"; "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In calculating a "reasonable hourly rate," the trial court should initially assess the prevailing market rate in the relevant community. *Blum*, 465 U.S. at 895. The prevailing market rate is "that rate which lawyers of comparable skill and

experience can reasonably expect to command within the venue of the court of record." *Adcock-Ladd* v. *Secretary of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000). The court then applies the hourly rate to the number of hours reasonably expended in the litigation. In approaching this task, the court should eliminate hours that are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 434. The burden is on the party seeking compensation to document the number of hours reasonably spent on the case. *Moore* v. *Freeman*, 355 F.3d 558, 566 (6th Cir. 2004).

The Fee Applications

Attorney Ronald Redick of the firm of Mika, Meyers, Beckett & Jones, PLC, has applied. for fees in the total amount of $9,870.00, representing the expenditure of 42 hours at $235.00 per hour. Mr. Redick represents defendants Ross Leisman, James R. Brown, and Mika, Meyers, Beckett & Jones, PLC ("the Mika Meyers defendants") in this case. Attorney Craig R. Noland, representing the Township Defendants (Grattan Township, Lana Green, David Munson, Richard A. Herweyer, Paul Knoerl and Dennis Heffron), has applied for fees in the amount of $3,688.00, representing 24.5 hours at $145.00 or $155.00 per hour. Plaintiff challenges both of these fee requests as excessive and unreasonable.

A. Redick Application

I find that the application for fees by Attorney Ronald Redick is excessive in both the hourly rate claimed and the amount of time spent on the litigation. Mr. Redick has been engaged in the practice of law for approximately seven years, having graduated from the Thomas M. Cooley Law School in the year 2000. His specialty is land use and environmental law.[4] His request for fees at the rate of

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[4] Mr. Redick's application also contains 3.2 hours of time

$235.00 per hour is supported by reference to his standard hourly rate, which he asserts is consistent with the 2003 Michigan State Bar Survey on the Economics of Law Practice. That survey presents a number of statistical findings that this court routinely uses as an aid in determining the reasonableness of requested attorney's fees. Few of these measures support a $235.00 hourly rate for defending this particular case in this particular jurisdiction. Exhibit 23 to the survey shows that the median billing rate for Grand Rapids is $175.00, with a $274.00 rate at the 95th percentile. Exhibit 24 shows that attorneys with between five and ten years experience in the "out-state" area had a $140.00 median hourly billing rate. For law firms with more than twenty attorneys, however this median increases to $173.00 per hour (Exhibit 25). The median hourly billing rate for attorneys in metropolitan areas other than Detroit was $165.00 in 2003, with a $278.00 rate being at the 95th percentile. (Appendix F). Exhibit 22 of the survey shows that the median hourly rate for "municipal/public entity law" is $175.00 per hour. The same table shows that the median rate for defense lawyers in non-personal injury cases was $215.00, with $325.00 lying at the 95th percentile.

In the experience of this court, defense of litigation brought by *pro se* plaintiffs against municipal defendants does not command a high hourly billing rate. Such work is often done on a contract or flat-fee basis by firms specializing in defense of municipalities. This work is very price-sensitive, as the defendants are generally spending public funds. Claims brought by *pro se* parties are often, although not always, meritless on their face and require no discovery and little legal research, as the defenses are patent. Often such claims are resolved by motion at the outset of the case, as was the circumstance here. The median

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expended by a person identified only by the initials NPJ. The record contains no information about this person, whose application for fees is, on this record, completely unsupported.

billing rate of $175.00 applicable to municipal law matters is a much better indicator of the prevailing market rate than is the category applicable to non-personal injury defense, which includes complicated construction cases, legal malpractice actions, and other civil cases infinitely more complicated than the defense of *pro se* litigation. Although Mr. Redick's standard hourly rate of $235.00 is probably appropriate to zoning and other land-use matters where millions may be at stake, it is significantly out of line for defense of cases such as the present one. Furthermore, it is significant that Mr. Redick is a member of the Mika, Meyers firm. The firm was therefore representing itself in this litigation and there was no "client" to judge the reasonableness of attorney's fees. Consequently, although a private attorney's customary rates can be used to help calculate a reasonable fee award, *see Hadix v. Johnson*, 65 F .3d 532, 536 (6th Cir. 1995), that factor is of little weight here. For these reasons, I find that the claimed rate of $235.00 per hour is excessive in this case, and that a rate of $175.00 more accurately reflects the prevailing rate for like services in the Grand Rapids market.[5]

The time claimed for defense of this matter is also unreasonably high. Mr. Redick logged 34.3 hours over ten business days (December 11 through 22, 2006) in reviewing and analyzing the complaint, formulating defenses, doing legal research, and preparing a dispositive motion and supporting brief. In light of the fact that the Mika, Meyers firm prosecuted the underlying ordinance enforcement action in the state courts, it should have not taken any appreciable time to analyze the facts or assemble the attachments to the dispositive motion, which principally

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[5] Mr. Redick's application also contains 3.2 hours of time expended by a person identified only by the initials NPJ. The record contains no information about this person, whose application for fees is, on this record, completely unsupported.

consisted of papers and opinions filed in the state-court action. Likewise, analysis of the legal issues should not have been complicated. The defense of prosecutorial immunity was obvious, and the application of the *Rooker-Feldman* doctrine and the defense of collateral estoppel were likewise apparent. The result of this effort was a "motion to dismiss and/or motion for summary judgment," supported by a twenty-page brief. The motion was accompanied by Exhibits A through S, consisting principally of state-court pleadings, briefs, and orders from the underlying litigation. The briefing of some of the issues followed the arguments presented in the state-court litigation and therefore required no further research. The remainder of the brief presented well-settled federal law that should not have required extensive research or complicated analysis. It is difficult to discern why this task should have consumed 34.3 hours, or nearly a week's worth of effort. Approximately three eight-hour days should have been more than sufficient to assemble the factual record (already known to the Mika, Meyers firm), perform legal research, and draft the motion and brief. I therefore conclude that the 34.3 hours claimed for the period December 11 through December 22, 2006, should be reduced by 9.3 hours to 25 hours. Mr. Redick also claims 1.1 hour in reviewing plaintiff's response to the motion for summary judgment and 2.3 hours in reviewing and analyzing plaintiff's objections to the report and recommendation. Plaintiff's response to the dispositive motion (docket #23) was twelve pages in length. To the extent that it was intelligible, it added little to the analysis in this case. Importantly, the Mika, Meyers defendants chose not to file a reply brief. Review and analysis of this document should have taken no more than thirty minutes. Plaintiff's objection to the report and recommendation (docket #32) was eleven pages in length and again added nothing. The Mika, Meyers defendants did not respond, yet spent 2.3 hours analyzing this document. One hour would

have been more than sufficient.

For the reasons set forth above, I conclude that the 42 hours of attorney time claimed on behalf of the Mika, Meyers defendants is excessive and should be reduced as follows;

3.2 hours Time spent by unidentified attorney NPJ

9.3 hours Excessive time spent in researching and briefing summary judgment motion

1.9 hours Excessive time spent analyzing plaintiff's briefs

This leaves a total of 27.6 compensable hours. Multiplied by the reasonable hourly rate of $175.00, this yields a lodestar amount of $4,830.00.

Once the lodestar amount is determined, the district court may consider other factors, generally known as the "*Johnson* factors," after *Johnson v. Georgia Highway Express, Inc.*, 488 F .2d 714 (5th Cir. 1974). See *Hensley*, 461 U.S. at 434 n.9. As summarized by the Sixth Circuit, these factors are:

"(1) time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time and limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in "similar cases." *Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). The Supreme Court, however, has limited the application of the *Johnson* factors, noting that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9; *see Geier v.*

Sundquist, 372 F.3d 784, 792-93 (6th Cir. 2004). Although an upward or downward adjustment to the lodestar amount is within the court's discretion in fare cases, *see Geier*, 372 F .3d at 793-94, I conclude that none of the *Johnson* factors warrants a modification of the lodestar. I have already considered many of these factors in calculating the lodestar itself, including the time and labor required, the novelty and difficulty of the questions presented, the skill needed to perform the legal services properly the customary fee, and the experience and ability of the attorney involved. The remaining factors do not, in my opinion, warrant a modification of the lodestar. In addition to seeking statutory attorney's fees the Mika, Meyers defendants seek $210.09 in costs, representing $174.75 in photocopy charges and $35.34 in LEXIS charges. In addition to statutory costs, section 1988 authorizes the court to award a prevailing party as an element of "reasonable attorney's fees" out-of-pocket expenses incurred by the attorney which would normally be charged to a fee-paying client in the course of providing legal services. *See Sigley v Kuhn*, Nos. 98-3977, 99-3531, 2000WL 145187, at * 9 (6th Cir. Jan. 31, 2000). Such costs include reasonable photocopying costs if properly supported. *Id.* Computer research costs mayor may not be compensable. The party seeking the award of costs has the burden of establishing "the precise basis for the charge" and of demonstrating "how the charges were reasonably related to the issues" in the case. *Auto Alliance Int 'I, Inc.* v. *U.S. Customs Serv.*, 155 Fed. App'x 226, 228-29 (6th Cir. 2005). Here, defendants merely listed the claimed items of cost, with no explanation whatsoever. These items should be disallowed.

In summary, with regard to the Mika, Meyers defendants, I recommend that statutory attorneys fees be taxed in the amount of $4,830.00.

B. Noland Application

Attorney Craig Noland, on behalf of the Township

defendants, has applied for fees in the amount of $3,688.00, representing 24.5 hours at $145.00 or $155.00 per hour. The Noland application raises none of the issues that led me to recommend a significant reduction of the Mika, Meyers fee application. Mr. Noland's hourly rate, principally $155.00 per hour, is at or below the prevailing rate charged in this community for similar defense work. The hours expended in drafting and briefing a dispositive motion were much more in line with that which one might reasonably expect an experienced attorney to invest in such a project. To be sure, by the time the Township defendants filed their motion, much of the analysis had already been done, as both the Mika, Meyers motion and the report and recommendation had been filed. This circumstance would naturally dictate the expenditure of fewer hours in briefing the same issues and, indeed, fewer hours were expended. The amount claimed is therefore at or below the lodestar amount for such services, and no *Johnson* factor creates a strong case for modifying the lodestar. Finally, the Township defendants have not sought the taxation of any costs.

Recommended Disposition

For the foregoing reasons, I recommend that statutory attorney's fees be taxed in favor of the Mika, Meyers defendants and against plaintiff in the amount of $4,830.00. I further recommend that statutory attorney's fees be taxed in favor of the Township defendants and against plaintiff in the amount of $3,688.00.

Dated: May 15, 2007

/s/ Joseph G. Scoville

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. L Civ R 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *See Thomas* v. *Am*, 474 U.S. 140 (1985); *Neuman v. Rivers*, 125 F.3d 315, 322-23 (6th Cir.), *cert. denied*, 522 U.S. 1030 (1997); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

APPENDIX K

Case 1 :06-cv-00657-RHB-JGS Document 9
Filed 12/26/2006

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL M. KENNEDY,
Plaintiff,

v. Case No.1 :06-cv-657
Honorable Robert Holmes Bell

GRATTAN TOWNSHIP, et al.,
Defendants.

ORDER REGARDING RESPONSE TO SUMMARY JUDGMENT MOTION

Defendants Ross Leisman, James R. Brown, and Mika, Meyers, Beckett & Jones have moved for summary judgment pursuant to FED. R. Civ. P. 56. Plaintiff is hereby notified of his opportunity to submit affidavits, documents, or other materials in opposition to the motion within 28 days of the date of this order, pursuant to W.D. MICH. L.Civ.R. 7.2(c). After that time, the motion will be considered ready for decision.

DONE AND ORDERED this 26th day of December, 2006.

/s/ Joseph G. Scoville United States Magistrate Judge

APPENDIX L
No. 07-1595

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER Filed Aug. 26, 2008 LEONARD GREEN, Clerk,

MICHAEL M. KENNEDY
Plaintiff-Appellant,

v.

GRATTAN TOWNSHIP,
Defendants-Appellees.

BEFORE: KENNEDY, BATCHELDER, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green Clerk

APPENDIX M

Supreme Court of the United States
Office of the Clerk
Washington DC 20543-0001
William K. Suter, Clerk of the Court

Re:
Michael M. Kennedy

v. Application No. 08-A-612

Grattan Township, et al.

Dear Mr. Kennedy:

The application for an extension within which to file a petition for writ of certiorari in the above entitled case has been presented to Justice Stevens, who on January 14, 2009, extended the time to and including January 23, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By /s/ Gail Johnson case analyst